Karen Yap Chew Ling v Binary Group Services Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS M-02(NCVC)(W)-613–03 OF 2021 AND M-02(IM)(NCVC)-256–02 OF 2021
LEE SWEE SENG, ABU BAKAR JAIS AND NORDIN HASSAN JJCA
4 JULY 2023

Tort — Breach of confidence — Grounds for claim — Defendant Head of Marketing in plaintiff company quit her job to join plaintiff's competitor — Plaintiff adduced evidence to show defendant prior to her departure had copied to her personal virtual accounts entire database of plaintiff's business contacts and clients and other confidential information — Whether this act of appropriation was sufficient to constitute breach of defendant's contractual obligation and fiduciary duty not to violate plaintiff's confidential information — Whether High Court correctly found defendant liable but erred in awarding plaintiff USD10m in damages as method used to compute the amount was fundamentally flawed — Whether matter had to be remitted back to trial court to re-assess damages on proper principles of law

The respondent sued the appellant, its former Head of Marketing, for misappropriating confidential information belonging to the respondent when she left its employ to join a rival company. The action was premised on the torts of deceit, breach of confidence and of fiduciary duties and for conversion. The respondent tendered evidence to show that several days before she ended her employment with the respondent, the appellant had, inter alia, copied to her personal virtual accounts the entire database of the respondent's business partners and contacts and clients. At the trial, the appellant did not call any witnesses to refute the respondent's case against her and she herself failed to attend the trial to testify (despite several adjournments granted by the court) claiming that her work schedules in Cyprus (where she was based by her new employer) as well as the Covid-19 virus situation did not permit her to do so. A day before the final adjourned trial date, the appellant formally applied for her evidence to be taken via Zoom. The application, which could only be processed after the trial was concluded, was dismissed. Since the appellant produced no evidence to rebut the respondent's case, the trial court held that the respondent had proven its case on balance of probabilities. The trial court accepted the evidence of the respondent's expert who valued the confidential information that the appellant had misappropriated at USD10.1m. That sum was awarded to the respondent as damages in addition to an order for an account of profits and prohibitory and mandatory injunctions against the appellant in relation to the confidential information. The appellant's appeals

herein were against the dismissal of her application to have her evidence taken via Zoom ('the Zoom appeal') as well as against the allowing of the respondent's claims against her ('the merits appeal'). With regard to the Zoom appeal, the appellant submitted that she had been denied of natural justice. As for the merits appeal, the appellant argued that even if the respondent's causes of action against her had been established, the assessment of the damages payable by her was flawed. The appellant submitted that the proper measure of damages was loss of profits (in respect of which no evidence was adduced) arising from the use of the misappropriated information and not damages based on the value of the confidential information as that would be tantamount to putting a sale price on the confidential information with the result that if the damages were paid the respondent would no longer have any further rights in or over the said information.

Held, unanimously dismissing the Zoom appeal, affirming the finding of liability in the merits appeal, setting aside the award of damages and remitting the case back to the trial court for a proper re-assessment of the damages payable by the appellant:

(1) The trial court had exercised its discretion correctly in not granting the appellant any further adjournments of the case or acceding to her request to give evidence via Zoom. Parties to a trial had to follow the court's timetable and prescribed mode of trial by being physically present to give evidence-in-chief and to be cross-examined by opposing counsel and then to be re-examined by one's own counsel unless there were compelling reasons to deviate from the said timetable and mode of trial (see paras 23–24).

(2) More than ample time was given to the appellant to make arrangements to travel back to Kuala Lumpur, undergo the necessary quarantine and to be present in court. As such, there was no breach of natural justice at all. It was not that the cross-examination of the appellant could not be done remotely via Zoom but the effectiveness of it might have been lost due to lagging, poor internet connectivity and the costs of engaging a supervising solicitor to ensure that there was no prompting during cross-examination. There was also the difficulty of ensuring that during the breaks, the witness did not communicate with her counsel over there in Cyprus. All of the respondent's witnesses had testified and been cross-examined physically at the trial. It did not appear fair that the appellant could avail of a less threatening environment to testify via Zoom and to face her accuser in the respondent's counsel in pixel and not in person (see paras 25–28).

(3) The appellant's formal application to testify via Zoom was only filed a day before the final adjourned date of the trial without a certificate of urgency to have it heard when the trial resumed. The court could not be faulted

for proceeding with the trial as scheduled and since neither the appellant nor her witnesses were present the defence had to close its case and directions were given for parties to file their submissions and a date for decision was fixed. By the time the appellant's formal application came up for hearing, it had become academic and the trial judge exercised her discretion to dismiss the same. This court would not disturb that exercise of discretion as the trial judge had taken all relevant factors into consideration before making her decision. There were no good reasons for the appellant not to be physically present to testify at the trial (see paras 29–32 & 40–43).

(4) By the terms of her employment contract and by reason of the fiduciary duties she owed the respondent as its Head of Marketing at the relevant time, the appellant was fully aware of the confidentiality that attached to the respondent's business databases and that she should not breach that confidence especially when she was leaving the respondent to join a rival competitor. The respondent had pleaded sufficient particulars of the confidential information that was involved and the manner in which the appellant had misappropriated them. The appellant did not plead ignorance or cluelessness about the confidential information pleaded by the respondent. The trial judge had reviewed and found the material to have the necessary quality of confidence (see paras 45–46, 56–60, 62 & 65).

(5) As far as the finding of liability was concerned, the trial judge was not plainly wrong in concluding that the respondent had proven the breaches of confidential information by the appellant (see paras 93 & 103).

(6) The assessment of damages at USD10.1m by the plaintiff's valuation expert was fundamentally flawed as there was no market for such confidential information and the projections and permutations of profits that could be generated from the use of the confidential information was premised on a projected actual use of it in generating business for the benefit of the appellant or the new company she worked for. No evidence was tendered of what confidential information was actually translated into income-generating business for the appellant or her new employer (see paras 160–162).

(7) The trial court failed to give any reason why it accepted the damages figure suggested by the respondent's expert witness. The expert's opinion could not be accepted uncritically just because there was no contrary expert evidence from the appellant. This court found that the respondent's expert had not explored the various methods and approaches available for assessing loss arising out of breach of confidential information and that his assessment of the so-called market value of the confidential information was artificial, speculative, unrealistic and unreliable (see paras 142–143, 145 & 165).

(8) The trial court's order granting the respondent both damages and an account of profits had to be set aside. The respondent would have to elect the one or the other. Since this court found that the respondent was not entitled to the USD10.1m damages, the respondent was entitled to proceed with the alternative remedy of an account of profits against the appellant. It was proper for this matter to be remitted back to the trial court for a proper re-assessment of damages. For that purpose, and In the interest of justice, both parties were at liberty to call further witnesses and to adduce further expert evidence as they might be minded to, subject always to the further directions of the trial court (see paras 164 & 167–168).

[Bahasa Malaysia summary

Responden menyaman perayu, bekas Ketua Pemasarannya, kerana menyalahgunakan maklumat sulit milik responden apabila beliau berhenti kerja untuk menyertai syarikat pesaing. Tindakan tersebut adalah berdasarkan premis tort penipuan, pelanggaran kepercayaan dan kewajipan fidusiari dan penukaran. Responden telah mengemukakan keterangan untuk menunjukkan bahawa beberapa hari sebelum beliau menamatkan pekerjaannya dengan responden, perayu telah, antara lain, menyalin ke akaun maya peribadinya keseluruhan pangkalan data rakan kongsi perniagaan dan kenalan dan pelanggan responden. Pada perbicaraan, perayu tidak memanggil mana-mana saksi untuk menyangkal kes responden terhadapnya dan beliau sendiri gagal menghadiri perbicaraan untuk memberi keterangan (walaupun beberapa penangguhan diberikan oleh mahkamah) dengan mendakwa bahawa jadual kerjanya di Cyprus (di mana beliau berpangkalan oleh majikan baharunya) serta situasi virus Covid-19 tidak membenarkannya berbuat demikian. Sehari sebelum tarikh perbicaraan terakhir yang ditangguhkan, perayu secara rasmi memohon keterangannya diambil melalui Zoom. Permohonan tersebut, yang hanya boleh diproses selepas perbicaraan selesai, telah ditolak. Memandangkan perayu tidak mengemukakan keterangan untuk menyangkal kes responden, mahkamah perbicaraan memutuskan bahawa responden telah membuktikan kesnya berdasarkan imbangan kebarangkalian. Mahkamah perbicaraan menerima keterangan pakar responden yang membuat penilaian bahawa maklumat sulit perayu telah menyalahgunakan sebanyak USD10.1 juta. Jumlah tersebut telah diberikan kepada responden sebagai ganti rugi sebagai tambahan kepada perintah untuk akaun keuntungan dan injunksi larangan dan mandatori terhadap perayu berhubung dengan maklumat sulit. Rayuan perayu di sini adalah terhadap penolakan permohonannya supaya keterangannya diambil melalui Zoom ('rayuan Zoom') serta terhadap kebenaran tuntutan responden terhadapnya ('rayuan merit'). Berkenaan dengan rayuan Zoom, perayu berhujah bahawa beliau telah dinafikan keadilan semula jadi. Bagi rayuan merit, perayu berhujah bahawa walaupun kausa tindakan responden terhadapnya telah dibuktikan,taksiran ganti rugi yang perlu dibayar olehnya adalah cacat. Perayu berhujah bahawa ukuran ganti rugi

yang sepatutnya adalah kehilangan keuntungan (yang mana tiada keterangan dikemukakan) yang timbul daripada penggunaan maklumat yang diselewengkan dan bukannya ganti rugi berdasarkan nilai maklumat sulit kerana ia sama dengan meletakkan harga jualan ke atas maklumat sulit dengan keputusan bahawa jika ganti rugi telah dibayar responden tidak lagi mempunyai sebarang hak lagi dalam atau ke atas maklumat tersebut.

Diputuskan, sebulat suara menolak rayuan Zoom, mengesahkan dapatan liabiliti dalam rayuan merit, mengetepikan pemberian ganti rugi dan mengembalikan semula kes tersebut ke mahkamah perbicaraan untuk penaksiran semula sewajarnya bagi ganti rugi yang perlu dibayar oleh perayu:

(1) Mahkamah perbicaraan telah menggunakan budi bicaranya dengan betul dalam tidak membenarkan perayu sebarang penangguhan lanjut kes atau bersetuju dengan permintaannya untuk memberikan keterangan melalui Zoom. Pihak-pihak dalam perbicaraan perlu mengikut jadual mahkamah dan cara perbicaraan yang ditetapkan dengan hadir secara fizikal untuk memberikan pemeriksaan utama dan untuk diperiksa balas oleh peguam lawan dan kemudian diperiksa semula oleh peguam sendiri melainkan ada yang sebab memaksa untuk menyimpang daripada jadual waktu dan kaedah perbicaraan tersebut (lihat perenggan 23–24).

(2) Lebih daripada masa yang mencukupi telah diberikan kepada perayu untuk menyusun perjalanan pulang ke Kuala Lumpur, menjalani kuarantin yang diperlukan dan untuk hadir di mahkamah. Oleh yang demikian, tiada sebarang pelanggaran keadilan semula jadi sama sekali. Bukannya pemeriksaan balas perayu tidak dapat dilakukan dari jauh melalui Zoom tetapi keberkesanannya mungkin telah hilang disebabkan oleh keralatan, sambungan internet yang lemah dan kos untuk melibatkan peguam penyelia untuk memastikan tiada gesaan semasa pemeriksaan balas. Terdapat juga kesukaran untuk memastikan bahawa semasa rehat, saksi tidak berkomunikasi dengan peguamnya di sana di Cyprus. Kesemua saksi responden telah memberi keterangan dan diperiksa balas secara fizikal semasa perbicaraan. Nampaknya tidak adil bahawa perayu boleh menggunakan persekitaran yang kurang mengancam untuk memberi keterangan melalui Zoom dan untuk berhadapan dengan penuduhnya dalam peguam responden secara piksel dan bukan secara bersemuka (lihat perenggan 25–28).

(3) Permohonan rasmi perayu untuk memberi keterangan melalui Zoom hanya difailkan sehari sebelum tarikh penangguhan akhir perbicaraan tanpa sijil perakuan segera untuk mendengarnya apabila perbicaraan disambung semula. Mahkamah tidak boleh dipersalahkan kerana meneruskan perbicaraan seperti yang dijadualkan dan oleh kerana perayu mahupun saksinya tidak hadir, pihak pembelaan terpaksa

menutup kesnya dan arahan telah diberikan kepada pihak-pihak untuk memfailkan penghujahan mereka dan tarikh untuk keputusan telah ditetapkan. Pada masa permohonan rasmi perayu dikemukakan untuk pendengaran, ia telah menjadi akademik dan hakim bicara menggunakan budi bicaranya untuk menolak perkara yang sama. Mahkamah ini tidak akan mengganggu penggunaan budi bicara tersebut kerana hakim bicara telah mengambilkira semua faktor yang berkaitan sebelum membuat keputusannya. Tiada sebab yang kukuh untuk perayu tidak hadir secara fizikal untuk memberi keterangan pada perbicaraan (lihat perenggan 29–32 & 40–43).

(4) Berdasarkan syarat kontrak pekerjaannya dan atas alasan kewajipan fidusiari yang beliau ada kepada responden sebagai Ketua Pemasarannya pada masa yang material, perayu mengetahui sepenuhnya tentang kerahsiaan yang dilampirkan pada pangkalan data perniagaan responden dan bahawa beliau tidak harus melanggar kepercayaan tersebut terutamanya apabila beliau meninggalkan responden untuk menyertai pesaing. Responden telah memplidkan butir-butir yang mencukupi mengenai maklumat sulit yang terlibat dan cara perayu telah menyalahgunakannya. Perayu tidak memplidkan tiada pengetahuan atau tiada klu tentang maklumat sulit yang diplidkan oleh responden. Hakim bicara telah menyemak dan mendapati material tersebut mempunyai kualiti kepercayaan yang diperlukan (lihat perenggan 45–46, 56–60, 62 & 65).

(5) Setakatmana dapatan liabiliti, hakim bicara tidak jelas salah dalam membuat kesimpulan bahawa responden telah membuktikan pelanggaran maklumat sulit oleh perayu (lihat perenggan 93 & 103).

(6) Taksiran ganti rugi sebanyak USD10.1 juta oleh pakar penilaian plaintif pada asasnya adalah cacat kerana tiada pasaran untuk maklumat sulit tersebut dan unjuran dan pilih atur keuntungan yang boleh dijana daripada penggunaan maklumat sulit tersebut adalah berdasarkan pada mengunjurkan penggunaan sebenarnya dalam menjana perniagaan untuk kepentingan perayu atau syarikat baharu yang beliau bekerja. Tiada keterangan dikemukakan tentang maklumat sulit yang sebenarnya diterjemahkan ke dalam perniagaan menjana pendapatan untuk perayu atau majikan baharunya (lihat perenggan 160–162).

(7) Mahkamah perbicaraan gagal memberikan sebarang alasan mengapa ia menerima angka ganti rugi yang dicadangkan oleh saksi pakar responden. Pendapat pakar tidak boleh diterima secara tidak kritis hanya kerana tiada keterangan pakar bertentangan daripada perayu. Mahkamah ini mendapati bahawa pakar responden tidak mengambilkira pelbagai kaedah dan pendekatan yang ada untuk menilai kerugian yang timbul daripada pelanggaran maklumat sulit dan penilaiannya terhadap apa yang dipanggil nilai pasaran maklumat sulit sulit adalah tidak tulen,

spekulatif, tidak realistik dan tidak boleh dipercayai (lihat perenggan 142–143, 145 & 165).

(8) Perintah mahkamah perbicaraan yang memberikan responden kedua-dua ganti rugi dan akaun keuntungan harus diketepikan. Responden perlu memilih satu atau yang lain. Memandangkan mahkamah ini mendapati bahawa responden tidak berhak mendapat ganti rugi USD10.1 juta, responden berhak meneruskan remedi alternatif bagi akaun keuntungan terhadap perayu. Ia adalah wajar untuk perkara ini dihantar semula ke mahkamah perbicaraan untuk penaksiran semula ganti rugi yang sewajarnya. Untuk tujuan itu, dan demi kepentingan keadilan, kedua-dua pihak bebas untuk memanggil saksi selanjutnya dan mengemukakan keterangan pakar selanjutnya sebagaimana yang mereka fikirkan, tertakluk kepada arahan lanjut mahkamah perbicaraan (lihat perenggan 164 & 167–168).]

Cases referred to

Acumen Scientific Sdn Bhd v Yeow Liang Ming [2020] 3 MLJ 82; [2021] 2 CLJ 369, CA (refd)

Aquaculture Corpn v New Zealand Green Mussel Co Ltd [1990] 3 NZLR 299, CA (refd)

Ashmore v Corp of Lloyd's [1992] 2 All ER 486, HL (refd)

Attorney General v Blake (Jonathan Cape Ltd, third party) [2001] 1 AC 268, HL (refd)

BBW v BBX and others [2016] 5 SLR 755, HC (refd)

Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] 4 All ER 418, PC (refd)

Bristol and West Building Society v Mothew (t/a Stapley & Co) [1998] Ch 1, CA (refd)

Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals [2022] 2 MLJ 273, FC (refd)

Certact Pte Ltd v Tang Siew Choy & Ors [1991] 4 CLJ Rep 716, HC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b, PC (refd)

Coco v AN Clark (Engineers) Ltd [1969] RPC 41 (refd)

Dowson & Mason Ltd v Potter and others [1986] 2 All ER 418, CA (refd)

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Ecooils Sdn Bhd v Raghunath Ramaiah Kandikeri [2014] 7 MLJ 309, HC (refd)

Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors [1998] 3 MLJ 422; [1998] 3 CLJ Supp 196, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 2 CLJ 309, FC (refd)

Ganesh Raja a/l Nagaiah & Ors v NR Rubber Industries Sdn Bhd [2017] 2 MLJ 396; [2017] 4 CLJ 420, CA (refd)
I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others [2020] 1 SLR 1130, CA (refd)
Kerajaan Negeri Kelantan Darul Naim v Syarikat Kemajuan Timbermine Sdn Bhd & Another [2013] 1 CLJ 537, CA (refd)
Kingtime International Ltd & Anor v Petrofac E&C Sdn Bhd [2020] 11 MLJ 141, HC (refd)
One Step (Support) Ltd v Morris-Garner and another [2019] AC 649, SC (refd)
Raghunath Ramaiah Kandikeri v Ecooils Sdn Bhd [2013] 1 LNS 360, CA (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Schmidt Scientific Sdn Bhd v Ong Han Suan [1997] 5 MLJ 632, HC (refd)
Seager v Copydex Ltd [1967] 1 WLR 923, CA (refd)
Seager v Copydex Ltd (No 2) [1969] 1 WLR 809, CA (refd)
Superintendent of Lands & Surveys Samarahan Division Jalan Dato Mohd Musa & Ors v Nikodemus ak Singai & Ors [2023] 2 MLJ 137; [2023] 2 MLRA 275, CA (refd)
Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling [2008] 7 MLJ 903; [2008] 8 CLJ 386, HC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (refd)
Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLJU 621, CA (refd)
UMW Toyota Motor Sdn Bhd & Anor v Allan Chong Teck Khin & Anor [2021] 3 MLJ 107, CA (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (folld)
Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297, HC (refd)
Wrotham Park Estate Company v Parkside Homes Ltd and others; Wrotham Park Estate Company v Parkside Homes Ltd [1974] 2 All ER 321, Ch D (refd)

Legislation referred to

Contracts Act 1950 s 28
Courts of Judicature Act 1964 s 15A
Rules of Court 2012 O 33A, O 92 r 4

Appeal from: *Binary Group Services Bhd v Karen Yap Chew Ling* [2021] MLJU 833 (High Court, Melaka)

Ambiga Sreenevasan (with Janini Rajeswaran, Gokul Radhakrishnan, Choo Dee Wei and Nur Shainaz bt Azizor Rahman) (Joel & Mei) in Civil Appeal Nos M-02(NCVC)(W)-613–03 of 2021 and M-02(IM)(NCVC)-256–02 of 2021 for the appellant.

Tommy Thomas (with Elaine Yap) (Elaine Yap Law Office) in Civil Appeal Nos M-02(NCVC)(W)-613–03 of 2021 and M-02(IM)(NCVC)-256–02 of 2021 for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] In a world where information travels at a speed rivalling that of light, there is a real temptation for an employee, when leaving the company, to take with him the confidential information of the company, especially when the employee is joining a competitor. A balance has to be found between protecting the confidential information of the employer and the employee seeking employment in a similar line where knowledge and experience gained at the previous employment would be what make the employee more marketable.

[2] The dividing line between confidential information and general knowledge, experience and expertise gained may be rather blurred in some instances. Coupled with that is the prohibition in our Contracts Act 1950 in s 28 where all contracts in restraint of trade against an employee are void. However, what is clear is that in whatever way a previous employee may want to be engaged in a competing setup or business, he is not to use the confidential information gained during his previous employment for his own benefit or that of the new competitor company that he now works for.

[3] The plaintiff, Binary Group Services Sdn Bhd ('BGS') had sued its ex-employee the Defendant, Karen Yap, for essentially misappropriating the confidential information of its affiliates, affiliate leads and introducing brokers ('business partners') and clients in its database. The plaintiff operates a website binary.com which provides, euphemistically speaking, customers with an online platform allowing users to trade currencies, contracts for differences (CFDs), commodities, and synthetic and volatility indices.

[4] The crude and candid word for the plaintiff's business as pleaded by the plaintiff is that it provides an online platform for gambling. Apparently, anything that moves up and down with an element of unpredictability, is fodder for the gambling business. It is an industry as old as mankind; the poor hope they become rich and the rich dream of going for the kill and becoming super rich. Whatever the fortune or misfortune that may be visited upon the trader, the company would always make money because it earns a commission on the bet place be it for selling or buying at an agreed price.

[5] We live in days where all of us who use the internet would leave behind our digital footprints. There is no email sent and document saved or files copied that cannot be traced by forensic IT experts. Even by deleting the delete and deleting the delete of the delete (*ad infinitum*), what is deleted can still be

retrieved with some difficulties no doubt. Little wonder that privacy, confidentiality and internet security are now very much prized.

IN THE HIGH COURT

[6] The plaintiff's cause of action in the High Court against the defendant was for:

(a) tort of deceit in that the defendant fraudulently misrepresented to the plaintiff that she would be resigning to join a start-up in computer games and the plaintiff acted to its detriment by allowing the defendant continued access to the 'confidential information';

(b) breach of confidence, both in contract and in equity, where the plaintiff claimed that the defendant breached her obligations of confidence by removing or transmitting the 'confidential information' and disclosed the same to Hatchworks or Spectre.ai, a competitor, that she now works for;

(c) breach of fiduciary duties in that the defendant knew that she was deliberately poached by Hatchworks to scale up Spectre.ai using her access to the 'confidential information'; and

(d) conversion in respect of the confidential information as well as the binary.com Telegram Group and an external backup storage device referred to as the Apricorn Disk.

[7] All the causes of action, save for the conversion in respect of the Telegram Group and physical Apricorn Disk, are premised on or relating to a breach of 'confidential information'. The confidential information which is the subject of the claim is defined in para 13 and Schedule A of the amended statement of claim. They are also reproduced in Schedule A to the judgment dated 17 March 2021.

[8] The damaging evidence adduced before the High Court consisted of the forensic IT Report produced by the plaintiff's forensic IT expert that showed a beehive of activities on the part of the defendant where she had copied wholesale the database of the plaintiff's business partners and clients' database in the hundreds of thousands of email addresses, commission paid, trade performed into her own storage space. There were also a huge number of emails copied to her own private email account.

[9] The defendant did not turn up for the trial to give evidence despite repeated adjournments. Her learned counsel made many requests, both oral and by letters, for her evidence to be taken via zoom which finally culminated in a formal application filed a day before the continued hearing of the

defendant's case. The application could only be processed after the conclusion of the trial and was dismissed by the High Court. At the trial the defendant was left with little choice but, through her counsel, to close her case.

[10] In the light of the fact that the evidence adduced by the plaintiff was not rebutted by the defendant or any of her witnesses, since the defendant did not call herself or any person or expert as her witnesses, the High Court applied the case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 (FC) and held that since the evidence given is not inherently incredible, and not seriously challenged under cross-examination, the plaintiff's evidence on the tort of deceit and breach of confidential information and conversion ought to be accepted and that where liability is concerned the plaintiff had proved it on the balance of probabilities.

[11] The High Court also accepted the evidence of the plaintiff's valuation expert that valued the confidential information, referred to in his report as 'Subject Asset' at USD10.1m. The High Court found comfort in the case of *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809, as the basis for this valuation.

[12] The High Court also granted a prohibitory and mandatory injunctions relating to the confidential information as defined in Schedule A to the judgment.

[13] On top of awarding damages to the tune of USD10.1m, being the value of the confidential information, the plaintiff was also granted an account of profits.

BEFORE THE COURT OF APPEAL

[14] While the substantive appeal ('merits appeal') was against the order of the High Court in finding the defendant liable for the breach of confidential information and the consequential reliefs of injunction, assessment of damages and an account of profits, there was also the appeal of the defendant against the order of the High Court in dismissing the application of the defendant to have her evidence taken via zoom from Cyprus ('Zoom appeal').

[15] The Zoom appeal is in Civil Appeal No M-02(IM)(NCVC)-256–02 of 2021 which Karen Yap filed against the dismissal of her notice of application in encl 115 pursuant to O 33A of the Rules of Court 2012.

[16] The merits appeal is in Civil Appeal No M-02(NCVC)(W)-613–03 of 2021 where Karen Yap filed against the judgment of the High Court after trial.

[17] The defendant as appellant argued in the Zoom appeal that there was a

breach of natural justice when she was wrongly denied the opportunity to give evidence remotely via Zoom and that the learned judicial commissioner ('JC') had exercised her discretion wrongfully in dismissing the defendant's application for the Zoom hearing.

[18] Before us for the merits appeal, the defendant as appellant, argued that the assessment of damages based on the value of the confidential information as endorsed in the case of *Seager v Copydex (No 2)* may not always be the appropriate measure of damages and that the method chosen must be appropriate based on the particular facts of each case. The defendant cited in support the case of *Dowson & Mason Ltd v Potter and others* [1986] 2 All ER 418, and argued that in a case of misappropriation of confidential information for use by Spectre.ai, a competitor of the plaintiff, the correct measure of damages is the loss of profits by reason of competition arising from the misappropriated confidential information.

[19] The defendant argued with considerable persuasion that a necessary implication of damages based on the value of the information is that the defendants are regarded as having made an outright purchase of the confidential information. As such, it is awarded in circumstances where the plaintiff is desirous of relinquishing its rights over the information.

[20] However, the plaintiff in the present case has no intention of parting with and relinquishing its rights to the confidential information and is in fact, compelling the defendant to deliver up all copies of it that the defendant had made and also a perpetual injunction restraining the defendant from making use of it.

[21] The defendant submitted that the High Court erred on the facts of the case in awarding damages based on the purported estimated value of the two 'confidential' databases. The defendant argued that the correct measure of damages, in the event the causes of action are established, is loss of profits, in respect of which no evidence was adduced.

Whether there was a breach of natural justice in the High Court's dismissal of the defendant's application to have her evidence given remotely via Zoom

[22] The plaintiff called three witnesses including an expert witness for valuation of the confidential information copied unlawfully. The defendant was absent throughout the trial and did not give evidence. She had written to the High Court a couple of times to request for an adjournment as she had already relocated to Cyprus where the headquarters of the new competitor company is based.

[23] She said she was fearful of travelling as the Covid pandemic was still raging. The trial judge had granted her a few adjournments and as she had still refused to attend court on the final adjourned date, the court had exercised its discretion correctly in not granting further adjournments or acceding to her request for a trial via a remote hearing using Zoom.

[24] Parties to a trial must follow the court's timetable and prescribed mode of trial unless there are compelling reasons to deviate from the trial dates fixed by the court or the prescribed mode of trial via being physically present to give evidence-in-chief and to be cross-examined by the opposing counsel and then to be re-examined by one's own counsel.

[25] More than ample time had been given for the defendant to make arrangements for travelling back to Kuala Lumpur, to undergo the necessary quarantine and to be present in court. The fact that her work permit in Cyprus would be expiring soon is no good reason for the defendant not coming back.

[26] There is no breach of natural justice at all if the defendant had been given an opportunity to be present to give her evidence and to allow herself to be cross-examined and then re-examined. The defendant must avail herself of the opportunity given to her to present her version of what happened and to subject herself to be cross-examined by the plaintiff's counsel.

[27] It is not that cross-examination cannot be done remotely via the Zoom technology but the effectiveness of it may be lost due to lagging, poor internet connectivity and also the costs of engaging a supervising solicitor to ensure no prompting during the cross-examination. There is also the difficulty of ensuring that during the breaks the witness does not communicate with her counsel over there in Cyprus.

[28] The plaintiff's CEO, PW1, Mr Jean-Yves Christian Sireau, had no problem travelling to be in the Melaka High Court to give evidence and to subject himself to being cross-examined for two days by the defendant's counsel. So too the other witnesses of the plaintiff. It does not appear fair that whilst the plaintiff's witnesses made arrangements to be physically present in court to give evidence, the defendant could avail herself of a less threatening environment via Zoom to give evidence and to face her accuser in the plaintiff's counsel in pixel and not in person.

[29] At any rate, the formal application to have the evidence of the defendant taken via Zoom was only filed a day before the final adjourned date for trial. There was no certificate of urgency filed with the application and hence was not ready for hearing the next day.

[30] The court cannot be faulted for proceeding with the trial the next day and as the defendant was not present and as there was no indication that any other witnesses would be called, the court asked learned counsel for the defendant if he would like to close his case. That was the only natural thing to do as the court cannot be waiting for the defendant who had no intention of appearing at the continued trial to give evidence.

[31] Directions were then given for submissions to be filed. When the application for the Zoom hearing came up for hearing, the High Court exercised its discretion to dismiss it on 6 January 2021.

[32] There were no good reasons for the defendant not to come back to be physically present to give evidence. Moreover, the matter was already academic as the defendant had closed its case and a date for decision had been fixed.

[33] We are conscious of the fact that the Courts of Judicature Act 1964 was amended with the introduction of s 15A with effect from 22 October 2020 to enable the courts to conduct proceedings through live video link or any other modes of electronic communication.

[34] Likewise, the Rules of Court 2012 ('the ROC') was amended with the introduction of O 33A with effect from 15 December 2020 to facilitate proceedings to be conducted by remote communication technology. There was also the introduction of the Arahan Amalan Ketua Hakim Negara Bilangan 1 Tahun 2021 with respect to the conduct of civil proceedings via remote communication technology.

[35] The decision to use the remote communication technology is at the discretion of the court as stated in the above Practice Direction. It is further stated that the court may have regard to the complexity of the case, the time to be taken for the taking of evidence, the quality of the internet transmission speed and the stability of the internet in the court's concerned. The trial judge always retains a full discretion on the manner a trial is to be conducted.

[36] We accept as the correct proposition of law as submitted by learned counsel for the plaintiff that it is wholly within the trial judge's discretion to determine the just, expeditious and economical disposal of the trial, including the manner in which the trial should proceed. The litigant is, for good reason, not allowed to dictate the conduct of proceedings as held by the House of Lords in *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486, per Lord Roskill at p 488:

> The Court of Appeal appear to have taken the view that the plaintiffs were entitled as to right to have their case tried to conclusion in such manner as they thought fit and if necessary, after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. *In the Commercial*

Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues. (Emphasis added.)

[37] Likewise, the dicta of Lord Templeman at p 493 as follows:

I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by the appellate court unless the judge was plainly wrong ... The only legitimate expectation of any plaintiff is to receive justice. *Justice can only be achieved by assisting the judge and accepting his rulings.* (Emphasis added.)

[38] It is trite that the Court of Appeal will be slow to interfere with the exercise of discretion by a trial judge. We agree and subscribe fully to the principle set out in *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 at p 151, where the Federal Court said this about the review of discretion by an appellate court:

There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but *there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion* ... (Emphasis added.)

[39] We find merits in the objection taken against Karen Yap's request for a Zoom hearing based on the following:

(a) the trial judge's ability to assess Karen Yap's demeanor and credibility in this case without filter;

(b) BGS counsel's ability to cross-examine Karen Yap without technical disruption;

(c) the absence of party representatives to ensure that no off-camera coaching is taking place, not only while Karen Yap is on-camera, but also during the expected breaks; and

(d) the absence of the solemnity of oath taking in open court in Malaysia and the general formality of such proceedings.

A **[40]** We would not disturb the exercise of discretion of the High Court in not allowing a further adjournment to allow a Zoom remote hearing. The learned JC had taken into account all relevant factors like the repeated adjournments already granted before for the defendant to make preparations to return to Malaysia to give evidence in person, the 11th hour application made only a day before the continued hearing and the fact that the application is rather academic with the defendant having closed her case.

[41] The defendant cannot have a trial conducted according to her own convenience and in her preferred mode via Zoom when the plaintiff's witnesses could all make arrangements, whether they were based in Malaysia or otherwise, to be physically present at the trial to give evidence and be cross-examined.

[42] It is to be noted that the learned JC had indicated that she had decided the case on the merits based on the evidence before her with the participation of counsel for both parties. The defendant's counsel had also cross-examined the plaintiff's three witnesses. Both sides filed written submissions and their counsel were heard orally before the High Court gave the decision.

[43] We were satisfied that the learned JC had taken into consideration all relevant factors and had not taken into consideration irrelevant factors in dismissing the application for a Zoom hearing of the defendant's evidence. We had thus dismissed the defendant's Zoom appeal on this issue. Leave to appeal to the Federal Court had been withdrawn by the defendant and as there is no further appeal on this issue, we do not think we need to labour the point further.

Whether the information, mainly in the nature of customers' database, taken out unlawfully, is confidential information

[44] We accept that under the law, confidentiality may be protected both under common law and contract such as under some non-disclosure agreement or confidential information agreement or as in this case the letter of employment and the communicated policies of the company as well as under equity. Equity protects confidence when information is received which is known to be confidential or that a reasonable recipient would have known it to be so. We accept the proposition of learned counsel for the plaintiff that a breach of confidence gives rise to a distinct equitable liability.

[45] It was a finding of fact of the learned JC based on evidence not refuted that the express terms of the contract of employment dated 9 February 2007 require Karen Yap to observe strict confidentiality in respect of confidential information belonging to the plaintiff during and after the termination of the

contract of employment. The plaintiff also has its Group Confidentiality Rules which Karen Yap was fully aware of being part of its senior management. We are also satisfied that the plaintiff had implemented strict policies on information security as evidenced by its Information Security Manual and Portable Computing Devices Policy. See CCB/4/24–68 and 69–74 respectively.

[46] Moreover, the defendant Karen Yap was also a fiduciary and owed fiduciary duties to the plaintiff. In her position as the Head of Marketing, she was also entrusted with the custody of the Apricorn Disk representing the data bank of the plaintiff updated on a daily basis containing confidential information. It goes without saying that she knows that she was not to breach the plaintiff's confidence reposed with her especially when she was leaving for Spectre.ai, a direct competitor of Binary.com. In transgressing the trust reposed on her by the plaintiff, she had transferred the whole treasure trove of confidential information to herself by making copies of it and then sought to cover any trail of such clandestine copying.

[47] We need not go further and farther than the observation of Millet LJ in *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1 at p 11 on who is a fiduciary as follows:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

[48] Learned counsel for the plaintiff referred to the case of *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 that to succeed in an action for breach of confidence the plaintiff must normally establish the following three conditions, laid down by Megarry J, namely:

(a) that the information which the plaintiff is seeking to protect is of a confidential nature;

(b) that the information in question was communicated in circumstances importing an obligation of confidence; and

(c) that there must be an unauthorised use of the information to the detriment of the party communicating it.

[49] The defendant's last position in the plaintiff after some 12 years as the Head of Marketing was such that she was part of the senior management charged with the responsibility for the marketing and business development of Binary.com worldwide and was the custodian of the plaintiff's confidential marketing data and had access to confidential information ('confidential information') defined in para 13 of the amended statement of claim and PW1's witness statement as follows:

(a) lists of affiliates and introducing brokers of Binary.com also called business partners;

(b) lists of clients and customers of Binary.com;

(c) contact details of and material business-related information on business partners, clients and customers of Binary.com;

(d) data and analysis of Binary.com's competitor spreads;

(e) trade secrets and product innovation at Binary.com;

(f) expansion and marketing plans for Binary.com;

(g) software, formulas and intellectual property of the Binary Group; and

(h) any other information made available to, compiled or acquired by the defendant during her employment with the plaintiff. These, information are either marked as confidential or which a reasonable person would deem to be confidential, whether printed or copied or stored on hard drives, disks, cloud storage and/or any other devices or systems capable of retaining electronic data and information.

[50] Learned counsel for the defendant argued that whilst the confidential information may have been described, they have not been specifically set out and particularised with the result that the learned JC had not evaluated them to satisfy herself that the information is indeed confidential information.

[51] There seems to be a tension between too broad a general description of confidential information such that an injunction to restrain the disclosing of such confidential information would suffer from the same infirmity of being vague on the one hand and on the other hand, a detailed description of the nature of the confidential information such that it would be identifiable if there is a breach of the injunction sought, without compromising its confidentiality status.

[52] In *Ganesh Raja a/l Nagaiah & Ors v NR Rubber Industries Sdn Bhd* [2017] 2 MLJ 396; [2017] 4 CLJ 420 (CA), the plaintiff sought an injunction to restrain the first appellant from disclosing:

trade secrets, trade mechanism list of customers/suppliers, contact numbers, method of contacting plaintiff customers/suppliers, offer price, source and condition of the plaintiff's (respondent) products for sale including list of forwarders and the related cost to third party.

[53] The claim ultimately failed because the relief did not correspond with the pleadings in that it was nowhere pleaded the nature of the information which was breached.

[54] On the other hand in *Acumen Scientific Sdn Bhd v Yeow Liang Ming* [2020] 3 MLJ 82; [2021] 2 CLJ 369 the Court of Appeal opined:

[29] The defendant was entrusted with all of the plaintiff's confidential information for eg, list of competitors, budget and performance, sales, operations, management and strategic planning, cash flow etc. In clear contravention of the terms of the agreements, the defendant failed to disclose of his close family relationship with Amcen. He had also utilised business information of the plaintiff in setting up his company which again was a clear breach of the terms of the agreement.

[55] Learned counsel for the plaintiff had summarised the following cases which are instructive on the pleading point and supporting the proposition that what categories of information are identifiable as confidential information depends on the facts of each case:

(a) *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297 — specifications and formulas that should be applied to each and every customer; right material to apply in order to get the accurate output, customer's list, pricing and design;

(b) *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903; [2008] 8 CLJ 386 — list of customer names;

(c) *Ecooils Sdn Bhd v Raghunath Ramaiah Kandikeri* [2014] 7 MLJ 309 — technology and trade secrets;

(d) *Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* [1998] 3 MLJ 422; [1998] 3 CLJ Supp 196 — schedules of information including marketing pricing and sales information; technical information relating to the operating system, pricing, costs;

(e) *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632 — confidential information and/or trade secrets of the plaintiff including but not limited to those particularised; and

(f) *Certact Pte Ltd v Tang Siew Choy & Ors* [1991] 4 CLJ Rep 716 — list of prices negotiated with and quoted by the suppliers, various confidential correspondence, including purchase orders, invoices etc.

[56] We are satisfied that sufficient particulars have been disclosed such that we would know if the information is confidential information when we see it. The amended statement of claim pleaded the following particulars and descended to the details of the confidential information misappropriated by Karen Yap as follows:

> 11. The Plaintiff relies on a vast global network affiliates and introducing brokers to market Binary.com to customers and local traders and to facilitate their business on Binary.com ('Business Partners'). To do so, the Plaintiff runs a competitive program for Business Partners to earn fees and commissions.
>
> 12. Business Partners are integral in introducing clients to Binary.com in their respective local jurisdictions and/or provide integral services as process agents in the processing of payments from their respective local jurisdictions.
>
> 13. As the Head of Marketing, the defendant was entrusted with unlimited access to commercially valuable information that is both proprietary to the Plaintiff and confidential in nature. Without limiting the generality of the aforesaid, such information include:
>
> (a) lists of Business Partners of Binary.com;
>
> (b) lists of clients and customers of Binary.com;
>
> (c) contact details of and material business-related information on Business Partners, clients and customers of Binary.com;
>
> (d) data and analysis of Binary.com's competitor spreads;
>
> (e) trade secrets and product innovation at Binary.com;
>
> (f) expansion and marketing plans for Binary.com;
>
> (g) software, formulas and intellectual property of the Binary Group;
>
> and any other information made available to, compiled or acquired by the defendant in the course of her employment, which are either marked as confidential or which a reasonable person would deem to be confidential (including all copies thereof), whether printed or copied or stored on hard drives, disks, cloud storage and/or any other devices or systems capable of retaining electronic data and information (collectively, 'Confidential Information').
>
> 14. Having regard to the nature of the information and detailed information, security policies and training imparted by the Plaintiff to its employees, the Plaintiff states that the defendant would have come into possession of the Confidential Information or any one or more of the same, in circumstances that would clearly import an obligation of confidence.

[57] Not only that but also in the amended reply, the plaintiff BGS further pleaded in para 8 as follows:

> (a) marketing folder in the Plaintiff's Dropbox ('Dropbox Marketing Folder') is another repository of data containing Confidential Information. It exists in addition to data maintained primarily in the Plaintiff's enterprise

facilities by Google which comprised a cloud storage drive ('Google Drive Marketing Folder') and corporate e-mail accounts and archives ('Corporate E-Mail Accounts');

(b) All employees of the Plaintiff with access to the Dropbox and Google Drive Marketing Folders are bound by obligations of confidentiality. They are not publicly accessible. As the head of department, the Defendant was the custodian of the Marketing Folders and was responsible for maintaining them.

[58] The plaintiff BGS had also pleaded that the following particulars of Karen Yap's wrongful acts of misappropriation of the confidential information in para 20 of the amended statement of claim:

(a) The Defendant had in the days preceding her last day of employment with the Plaintiff, forwarded emails containing Confidential Information to her personal email at karen_yap@hotmail.com and trashed the sent emails to conceal her actions;

(b) The Confidential Information that the Defendant had dealt with as aforesaid include:

(i) her entire electronic office calendar containing dates, names and contact details from meetings since 2013;

(ii) spreadsheet of payment agent deposit transactions containing details of all payment agents of Binary.com, including such payment-agent contact person names and Binary.com login IDs;

(iii) email discussions on a new product being developed for Binary.com known as 'multiplier contracts'; and

(iv) email discussions on the Binary Group's plans to set up a company in Dubai.

(c) On her departure, the Defendant failed to deliver up to the Plaintiff any documents or records of the Plaintiff in her possession and control.

The Plaintiff reserves the right to claim in respect of all other incidence of breach discovered.

[59] Further in para 9 of the amended statement of reply, the plaintiff pleaded as follows:

(a) The Defendant had since November/December 2018 until her last day of employment, deliberately and systematically pilfered Confidential Information from the Plaintiff with the intent of exploiting the same in her new employment by forwarding corporate e-mails to her personal e-mail account, copying and retaining such data;

(b) The Defendant had accessed the Plaintiff's Google corporate facilities and performed a Google Takeout on 30-3-2019 and 31-3-2019, i.e. downloading of 100s of megabytes of data from the Google Drive and her

corporate email account into zipped files for transfer to the Apricorn Disk or some other hard drive, 4 days prior to her last day of work; and

(c) The Defendant unlawfully retained control of and failed to transfer/return the Telegram Group and the Apricorn Disk to the Plaintiff prior to her departure from the Plaintiff. Despite a specific demand for their transfer/return made by letter dated 9-8-2019 from the Plaintiff's solicitors, the Defendant has refused to do so.

[60] The identification and nature of the confidential information misappropriated by Karen Yap are pleaded and particularised, including in a list of 77 emails reproduced in Karen Yap's response to the plaintiff's request for further and better particulars of her defence. The document titled 'Particulars Served Pursuant to Court Direction' was duly signed by both the solicitors for the plaintiff and the solicitors for the defendant and duly filed by the plaintiff's solicitors with the vourt. See encl 3 at pp 145–150.

[61] Karen Yap did not state that she had problem identifying the confidential information as defined in the amended statement of claim. She further even claimed to have complied with the injunctions with respect to the confidential information at the interlocutory stage and post-judgment. Reference is made to her compliance affidavit in CCB Vol 4 pp 198–199 where she said on oath:

> 6. For the record, my departure from the Plaintiff was on 4-4-2019. While several emails were sent to my personal email at karen_yap@hotmail.com, on my departure, I have deleted the emails containing all Confidential Information.

[62] As rightly pointed out by learned counsel for the plaintiff, the defendant had not raised the allegation that the confidential information was so vague to the extent that she was not in a position to comply with the prohibition in the injunction. She certainly did not plead ignorance of nor was she clueless of the confidential information.

[63] The observation in *Electro Cad Australia Pty Ltd & Ors v Mejati RCS Sdn Bhd & Ors* [1998] 3 MLJ 422; [1998] 3 CLJ Supp 196 would be apt:

> In this case we are dealing with trade secrets which may be defined as information which any reasonable employee would recognize as secret to his employer's business.

[64] Learned counsel for the plaintiff highlighted the fact that evidence of the confidential information misappropriated by Karen Yap was adduced in the many volumes of the trial bundles and appeared in over 22 enclosures of the appeal record and individually addressed by PW1 in his testimony in his witness statement in CCB Vol 3 pp 83–89. Learned counsel for the plaintiff summarised it as follows:

(a) appendices to the LGMS Digital Forensic Investigation Report, including:

(i) email attaching a link to BGS' close.com CRM database exported by Karen Yap and emailed to her personal Hotmail on 25 November 2018;

(ii) copy of BGS' Affiliate Payment List for January 2019 exported by Karen Yap (from the CRM database) on 4 February 2019;

(b) email attaching a link to an updated copy of BGS' close.com CRM database exported by Karen Yap on 30 March 2019 and 4 April 2019 (her last day of work);

(c) email attaching a link and a page from a listing of about 2 million email addresses of customers from BGS' customer.io database exported by Karen Yap on 4 April 2019 (her last day of work);

(d) appendices to the expert report of PW3, BGS' expert witness on assessment of damages who assessed the market value of 2 of the stolen databases ('PWC Report'), including:

(i) printout of BGS' MyAffiliates system; and

(ii) printout of BGS' close.io system.

[65] We are satisfied that the trial judge had reviewed and found the material to have the necessary quality of confidence, (para [25]–[26] of the GOJ in CCB Vol 1 pp 23–26) as the confidential information include materials such as these:

(a) email sent to Karen Yap on her last day of work on 4 April 2019 attaching her close.com database export of 43,000+ Business Partners — Affiliate Export CCB Vol 4 p 203;

(b) email sent to Karen Yap on her last day of work on 4 April 2019 attaching her customer.io database export of 2+ million customers — Customer Export CCB Vol 4 p 205;

(c) email sent by Karen Yap to her personal Hotmail account on 5 March 2019 attaching affiliate new sign-up report and analysis Jan 2017 to Apr 2018 — A34 — CCB Vol 5 pp 132–158; and

(d) email sent by Karen Yap to her personal Hotmail account on 1 March 2019 attaching an application to Labuan FSA for cryptocurrency exchange license attaching confidential Business Plans and Whitepaper — A36 — CCB Vol 5 pp 159–210.

[66] Her defence was that she needed to access those information from the home and while travelling. She must be prepared to be present to be

cross-examined on that but she was not present throughout the trial. The explanation of PW1, the founder and CEO of the plaintiff, was that her explanation makes no sense at all as she was able to access the company's emails on her phone and that she always took her company laptop home too.

[67] The emails are clearly confidential information as can be seen in their descriptions in answer to question 35 of PW1's witness statement and in Appendices A1 to A77. As explained by PW1 there was no lawful purpose for the defendant to have emailed them to her personal account on her last day of work on 4 April 2019 unless she has the intention of using it. There was no action that was required to be taken on the emails by her as the emails were copied to her as a courtesy since she was still considered part of the senior management of the plaintiff. PW1 further explained that based on the work handover list completed, the defendant's duties had already been operationally handed over as at 18 March 2019.

[68] A spike in the activities of copying confidential information especially in the months, days and hours before Karen Yap left the plaintiff and some in the middle of the night, can only speak of a clandestine and carefully concealed conduct designed to escape detection if possible. She underestimated the fact that technology has been developed to trace one's digital footprints and that nothing is ever lost forever in cyberspace. Companies run a real risk of and are vulnerable to theft of confidential information that can have damaging consequences for their business for ultimately someone senior in the companies would have to be entrusted with such confidential information to protect its integrity and to prevent unlawful access and copying of it to the detriment of the companies. The tough question has always been who would guard the guardians and watch the watchmen and gatekeepers.

[69] Our courts have come to recognise the many expressions of confidential information in the business context. In *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632 the High Court held:

> It is my judgment that trade secrets are not limited to manufacturing processes or secret formulae but extend to information relating to the *list of names and addresses of the customers and suppliers, specific questions sent to the customers, costs prices, specific needs and requirements of the customers and status of the ongoing negotiation with the customers. Therefore, it is my finding that in the light of the particular trade setting of the plaintiff's business, the abovementioned information had the necessary quality of confidentiality.* The first, second, third and fourth defendants are not entitled to make use or make copies of the said information for the benefit of the fifth defendant in competing with the plaintiff's business. (Emphasis added.)

[70] As would be expected, what constitutes confidential information and trade secret varies from industry to industry. In *Raghunath Ramaiah Kandikeri*

v Ecooils Sdn Bhd [2013] 1 LNS 360, the Court of Appeal said:

> [14] A trade secret is regarded as confidential information. To determine whether particular information is a trade secret would depend on the test as stated in the case of *Saltman Engineering Co Ltd and others v Campbell Engineering Co. Ltd.* [1963] 3 All ER 413 and that is 'what makes it confidential is the fact that the maker of the document has used his brain and was produced a result which can only be produced by somebody who goes through the same process'. This statement was also quoted in cited in *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297 ...

[71] In *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903; [2008] 8 CLJ 386, Vincent Ng J (later JCA) also said:

> In my judgment, the confidentiality of the said confidential information (which includes customer lists and details) could not be seriously disputed as this has been expressly mentioned in cl. 7.01 (ii) of the employment agreement. And, it must be recognised that particulars such as customer's names, lists and details have also been judicially recognised as being confidential in nature, and wrongful utilisation of such particulars warrants injunctive protection ...

[72] Karen Yap only needed to ask the hypothetical question: 'Would the company give me the permission to copy and keep these information for my use for the benefit of a competitor that I would soon be joining?'. To ask such a question would be to ask the obvious! These are not material in the public domain and they have been collected, collated and curated over a course of time and would clearly be of substantial interest and value to a competitor.

[73] We are satisfied that the confidential information has been identified with sufficient particularity in the amended statement of claim and amended reply and especially in PW1's witness statement such that it is clearly identifiable when the question is asked: Is this information 'confidential information?'.

Whether in the absence of the evidence from the defendant or her witnesses, the evidence of the plaintiff, where the liability of the defendant is concerned, should be accepted unless inherently incredible

[74] When the defendant gave notice of her resignation effective 28 February 2019, she had represented to the plaintiff that she was joining a new company on 1 June 2019 to kickstart the marketing department of a startup in the video and mobile games industry. See the Letter of Resignation at CCB Vol 4 p 75.

[75] That turned out to be untrue; a matter which according to the plaintiff the defendant knew all along but was actively concealing it from the plaintiff.

As transpired, the defendant was hired as an operations committee member tasked with scaling and monitoring Spectre.ai, a direct competitor of Binary.com. Evidence led by the plaintiff showed that she had started work for Spectre.ai from Cyprus in June 2019. Social media activities and an article revealed her role in Spectre.ai. The details are as follows: Telegram — CCB 4 pp 105–142; Facebook — CCB Vol 4 pp 143–181; Medium blog — CCB Vol 4 pp 100–104.

[76] Meanwhile the CEO of Spectre.ai, the competitor that the defendant had joined, could not contain his excitement and exhilaration in having poached her to join him at Spectre.ai. In fact, evidence was led that in Webinar messages by the CEO of Spectre.ai to its shareholders, he boasted of having poached the head of business development of its competitor to steal its substantial affiliate book of business. The description of the person poached matched Karen Yap in every material respect. Reference is made to the 2018 Q3 Results at CCB Vol 4 pp 91–97 and the 2019 AGM at CCB Vol 4 pp 98–100.

[77] The relevant messages by the CEO of Spectra.ai at CCB Vol 4 pp 93 read as follows:

> ... The most expensive way to get growth is Google PPC. The yield on those campaigns, for those of you that are marketers will know, is very low and the best way to get growth is to actually get people who have existing networks and bring them over.
>
> ...
>
> But instead, what we have done is we've taken out one of our biggest competitors, with a much lower spend so to put it, a monthly salary, with a good variable compensation plan what have you. This person hypothetically, not that they will, but hypothetically can literally take over Spectre.ai and run it. They are a veteran in that space. They really understand this space. I will say it better than I do and I have been a equity researcher, investor and trader for many years but this specific space, their networks of affiliates is far bigger than that. So, very positive, strategic move forward for us. This happened in late December.

[78] It was clear to the learned JC hearing the evidence of PW1 that Karen Yap had joined Hatchworks and was tasked with scaling up Spectre.ai, a competitor of Binary.com, and that she was actively marketing for Spectre.ai in competition with the plaintiff.

[79] The learned JC did not accept the case put by Karen Yap that the strategic hire referred to by the CEO of Spectre.ai in his messages to Spectre.ai's shareholders, was Khalik Pratama. The description of his job title and designation and the fact that he was never based in Cyprus was the give-away.

[80] The learned JC was right in her finding of fact that the representation in Karen Yap's letter of resignation that she was joining a mobile/video gaming start-up was false, and that the plaintiff had relied on it to its detriment as follows:

> [23] Based on the facts agreed by the parties and the findings of facts as set out above, this court made the following findings, namely that:
>
> (a) the defendant did not correctly represent to the plaintiff her association with and later her employment by a competitor of the plaintiff which was invested in Spectre.ai;
>
> (b) the defendant knew that her representations to the plaintiff was untrue and/or the defendant had no belief in the truth of her representations to the plaintiff; and
>
> (c) the defendant intended the plaintiff to act on her representation and the plaintiff did so act on the representation by the defendant. One example of the result of the defendant's untrue representation was that the plaintiff did not put in place any steps to stop the defendant from having unrestricted access to the plaintiff's confidential information, and damage was caused to the plaintiff (see below).

[81] It is of course open to the defendant to attend court and give evidence to refute this serious allegation but she had chosen to stay away and would give evidence only if it is via a Zoom hearing.

[82] What is more damaging is that when the plaintiff investigated the defendant's pre-departure activities as disclosed in the LGMS Report at CCB Vol 5 pp 28–67, it was shown that the defendant Karen Yap had, among others:

(a) undertaken Google Takeout's from the Google Drive containing the plaintiff's marketing data on 30 March 2019 and 31 March 2019; and

(b) sent unusual volumes of email from her office email to her personal Hotmail account between Nov/Dec 2018 and 4 April 2019.

[83] Learned counsel for the plaintiff submitted that as the defendant's counsel had elected to close her case on 23 December 2020 without the defendant giving evidence, the trial judge was under a duty to assume the plaintiff's unchallenged evidence to be true following the principle of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 (FC). Basically, the principle as enunciated is that all the evidence given on behalf of the plaintiff would be presumed to be true unless it is inherently incredible or inherently improbable in a case where the defendant did not give evidence to the contrary to refute the plaintiff's evidence.

[84] Generally, in such a circumstance where there is no evidence from the defendant to refute or rebut the plaintiff's evidence, then the plaintiff's evidence shall be accepted as true unless it is inherently incredible or fanciful or that there is clear inconsistencies or contradictions that the plaintiff witnesses could not explain satisfactorily as may be evident when they were being cross-examined by the defendant's counsel. In other words, unless the plaintiff's evidence has been seriously called into question or demolished under cross-examined, it would be taken to be true.

[85] It was observed in *Takako Sakao* that:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:
>
> > If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. *For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.*
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. *She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way.* He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice. (Emphasis added.)

[86] We do not think that there is any merit in the defendant's argument that the above principle is only applicable in a case where the defendant 'studiously refrained from giving evidence.' It is equally applicable where no evidence is forthcoming from the defendant when every opportunity has been given to the defendant to give evidence and further adjournments have been rejected by the trial court.

[87] Thus, in a case like *Takako Sakao* where the defendant closes its case without calling any witness, it was observed as follows:

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Amor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: *'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.'* There are two other authorities that are of assistance on the point. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. *But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.* (Emphasis added.)

[88] Like all civil cases the plaintiff would still have to prove its claim on a balance of probabilities; a task made simpler as there is no evidence from the defendant's side to refute the plaintiff's evidence. Thus, the Court of Appeal in *Kerajaan Negeri Kelantan Darul Naim v Syarikat Kemajuan Timbermine Sdn Bhd & Another* [2013] 1 CLJ 537 approached the evaluation of the evidence adduced from the point of view of discharging the burden of proof as follows:

[12] In the Supreme Court's decision of *Jaafar Shaari & Siti Jama Hashim v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509, the Court of Appeal in *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369, observed that:

> It is trite that when a submission of no case is undertaken, it means that a defendant at the close of the plaintiff's case (in this case the appellant's) either had not made out a case in law, *or the evidence was unsatisfactory or unreliable for the court to hold that the burden had been discharged.* In *Storey v Storey* [1961] P 63, at p 5 the court opined in the following manner:
>
> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so

A unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged. (Emphasis added.)

[89] Learned counsel for the plaintiff alerted us to the recent developments in Singapore where the Court of Appeal in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130, recently modified the burden of proof in an action for breach of confidence as follows:

> 61. Upon the satisfaction of these prerequisites (the first 2 requirements in *Coco*), an action for breach of confidence is presumed. This might be displaced where, for instance, the defendant came across the information by accident or was unaware of its confidential nature or believed there to be a strong public interest in disclosing it.
>
> Whatever the explanation, the burden will be on the defendant to prove that its conscience was unaffected. In our view, this modified approach places greater focus on the wrongful loss interest without undermining the protection of the wrongful profit interest.
>
> 62. A shift in the burden of proof also addresses the practical difficulties faced by owners of confidential information in bringing a claim in confidence ... defendants are comparatively better positioned to account for their suspected wrongdoing'

[90] It appears to be another way of saying that once the plaintiff has adduced prima facie evidence of a breach of confidential information, the evidential burden shifts to the defendant to rebut and refute. There is already a breach of the confidential information by unlawfully accessing and storing it such that one may have ready access to it and deploy it whenever one needs it.

[91] Even if as yet, nothing could be shown on how it has been unlawfully used for the profit of another, the very act of unlawful copying and accessing is enough violation of the plaintiff's right to the integrity and exclusive use of the confidential information such that a case for exemplary damages may be made out. It is no different from a thief who has been caught with the stolen item and who then has the audacity to say that the owner has suffered no loss as he has not realised it was stolen and the stolen item has since been returned.

[92] Karen Yap, in the absence of her own personal explanation from the witness stand, has no credible answer to the evidence of wrongdoing presented in the breach of confidential information by her just before she left the plaintiff for a competitor.

[93] We agree with the learned counsel for the plaintiff to the extent that as far as the finding of facts where liability is concerned, the learned JC's findings could not be said to be plainly wrong or that she had failed to appreciate the relevant evidence before her. See the cases of *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b (PC) and *China Airlines Ltd v Maltran Air Corp Sdn Bhd*

(formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163 (FC) and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 2 CLJ 309 (FC).

[94] Learned counsel for the plaintiff also referred to the following dicta of Lord Hodge in the Privy Council appeal in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] 4 All ER 418 at p 426 which resonates with this court:

> The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

[95] Suffice to say that in the instant case at the trial, most of the critical evidence is in the nature of documentary evidence and the Digital Forensic Investigation Report referred to as the LGMS Report, thus making the exercise of evaluation of evidence on liability a more objective one.

[96] As for the tort of conversion in the Apricorn Disk, a 1TB Apricorn Aegis Padlock USB 3.0 256bit AES XTS Hardware Encrypted Portable Hard Drive (Serial Number 100600062688) ('Apricorn Disk'), Karen Yap merely said in her defence that she does not have it in her possession, custody or control.

[97] The plaintiff's evidence is that sometime in February 2018, Karen Yap was further entrusted with Apricorn Disk which was to serve as a backup disk for data generated and maintained by herself and the marketing department, including the confidential information.

[98] We accept the evidence adduced by the plaintiff that Karen Yap did in fact perform regular back up of marketing data onto the Apricorn Disk as required from time to time as shown from the Google Takeout activities in the plaintiff's server logs. The data in the Apricorn Disk would thus mirror that which resides in Karen Yap's corporate email archives and Google Drive as they relate to the marketing department.

[99] Quite tellingly she did not plead that she never had it in her possession, custody and control. That can only mean that she once had the Apricorn Disk and she should be able to say who she had handed it over to. She would be able to appreciate that the Apricorn Disk is a repository of all the information of the plaintiff updated on a daily basis.

[100] Whilst we appreciate that we cannot prove a negative, what is stated in the pleading is not evidence and she must be prepared to say under oath on when was the last time she handled the Apricorn Disk and what happened subsequently.

[101] If she had returned such an important item before her departure from the plaintiff, one would expect some acknowledgment of some kind or she could at least have told the court who she handed it over to.

[102] As for the Telegram Group, it was accessible from https://t.me/binarydotcom, which was created and held in Karen Yap's name. One would have thought that after a formal demand had been made, Karen Yap would have taken the steps to change the administrator to a new representative of the plaintiff or that she would exit the group altogether. If really there were hiccups in performing the transfer, we see no good reason why other modes of ensuring the confidential information contained in the Telegram Group is preserved, could not be suggested by Karen Yap.

[103] We are satisfied that the plaintiff had proved the breaches of the confidential information by the defendant Karen Yap. For the same reason, we would also not disturb the finding of the learned JC on conversion in respect of the Telegram Group and physical Apricorn Disk which essentially also boils down to a breach of confidential information contained in the Telegram Group and the Apricorn Disk.

Whether the confidential information may be redacted without leave of court for the purpose of establishing liability

[104] Generally, no parties should take liberties to unilaterally redact documents tendered in court as evidence unless the redaction is not objected to by the other side and the need to redact is apparent to all.

[105] The defendant has no problem with what is redacted and she said in her answer in 'Particulars Served Pursuant to Court Direction' to the fact that she does not have that confidential information with her. She must be presumed to know what she is referring to for otherwise how would she be able to say she does not have them. She could have qualified what she wanted to say by saying that whatever information maybe in the redacted documents, 'I do not have them with me'.

[106] In *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621, Wong Kian Kheong J (now JCA) observed as follows:

[25] As stated above, the plaintiff's List of Assets (in 2005) (exhibited in the plaintiff's third affidavit), had been redacted by the plaintiff. Neither the court nor the defendant knew what had been redacted in the plaintiff's List of Assets (in 2005).

[26] I am of the following view regarding redaction of documents which are exhibited in affidavits in an OS:

(1) a party should not have unilaterally redacted a document exhibited in an affidavit without leave of the court under O 38 r 2(2) of the RC. The phrase 'unless ... the Court otherwise directs' in O 38 r 2(2) RC empowers the court to allow a party to apply for leave of the court to redact an exhibit in an affidavit (redaction application);

(2) in a redaction application, the court has the power to inspect the unredacted document to ensure that the redaction application is made in good faith and for a valid reason, for example, to ensure confidentiality of a party's information or to avoid publication of offensive, indecent or scandalous material. The party opposing the redaction application is not entitled to inspect the unredacted document, unless permitted by the applicant in the redaction application; and

(3) if a party has unilaterally redacted a document exhibited in an affidavit without leave of the court:

(a) the court is in the dark as to what are the contents of the redaction and is therefore not in a position to decide on the redacted exhibit; and

(b) the opposing party is not in a position to answer regarding the redacted document. Accordingly, no adverse inference can be made against the opposing party for his or her failure to reply to a redacted exhibit in an affidavit.

[27] The plaintiff's List of Assets (in 2005) had been redacted by the plaintiff without leave of this court under O 38 r 2(2) of the RC. Consequently, the defendant cannot be deemed to have accepted the plaintiff's List of Assets (in 2005). Nor can any adverse inference be drawn against the defendant for its failure to reply to the plaintiff's List of Assets (in 2005).

[107] In civil procedure, short of an admission as to the truth and authenticity of the documents filed in the bundle of documents, then in the absence of an objection on authenticity, the court hearing the parties will decide on the weight to be attached to the documents considering whether there had been any cross-examination on the documents to show why no or little relevance may be placed on it.

[108] Here Karen Yap's counsel had not objected to the redacted documents filed in the bundle of documents and the High Court was entitled to rely on the

redacted documents as disclosing what the plaintiff said it is — that it is the email addresses and other contact details of the business partners of the plaintiff.

[109] In an adversarial system if Karen Yap had taken objection to documents that she would ordinarily be familiar with as an employee entrusted with such confidential information, then it is incumbent for her learned counsel to register her objection with the court. The plaintiff would then be able to apply for the necessary protection order or sealing order and progress further with the case. She is thus estopped from raising the argument that she does not know what the confidential information is.

Whether the plaintiff's valuation expert's method of assessing the value of the customers' database is speculative, uncertain and unreliable

[110] The valuating expert of the plaintiff in PW3 had stated that the scope of his instruction was to perform an independent valuation of the subject asset. The subject asset here is the plaintiff's list of global network affiliates and introducing brokers which was unlawfully accessed and taken possession by the defendant as at the valuation date which was 31 January 2019.

[111] The subject asset comprises two components, which are:

(a) the list of affiliates who were paid commissions between January 2018 and January 2019 (based on the affiliate commission payment report downloaded by the defendant on 4 February 2019 as listed in file A49 of the LGMS Digital Forensic Investigation Report); and

(b) the affiliate leads database (based on the Binary.com Affiliates Report downloaded by the defendant on 26 November 2018 as stated in file A75 of the LGMS Digital Forensic Investigation Report), which includes all the affiliate leads stored in the plaintiff's online system, namely 'close.io' from 2015 to 26 November 2019 ('affiliates leads').

[112] We are of the considered view that the plaintiff had proceeded on an inappropriate basis of assessing damages for the subject asset is not lost forever. The plaintiff has their own copy of it for otherwise it would not have been in a position to produce the voluminous copies of the subject intangible asset in the affiliates, affiliates leads and customers' database. Once the plaintiff started off on a wrong footing in assessing the value of the subject asset, it would naturally come to a wrong conclusion.

[113] The plaintiff has no intention of selling the subject asset to anyone, or for that matter to the defendant or the company that she now works and for

that matter, to any competitor. The plaintiff has every right to hold on to and keep safe its confidential information built up through the years. A

[114] Furthermore, as decided in *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809, the sum when paid as assessed by the court based on the value of the subject asset consisting of the intangible asset in the confidential information has the effect of transferring the rights in the use of the confidential information to the defendant. That is not what the plaintiff wanted and we do not think in the circumstances of this case, the court should compel the plaintiff to such a sale especially when the plaintiff perceives that such confidential information can easily be translated into income generating business. B C

[115] In fact, the very criteria in the International Valuation Standards ('IVS') published by the International Valuation Standards Council ('IVSC') that the plaintiff's expert had relied on for preferring the market approach to the valuation of the subject asset have not been met. Paragraph 4.4.3. of the plaintiff's expert report reads: D

> Para. 20.2 the Market Approach should be applied and afforded significant weight under the following circumstances: *(a) the subject asset has recently been sold in a transaction appropriate for consideration under the basis of value (b) the subject asset or substantially similar assets are actively publicly traded, and/or (c) there are frequent and/or recent observable transactions in substantially similar assets.* (Emphasis added.) E

[116] The plaintiff's expert had not identified how the criteria (a) or (b) or (c) above have been in his expert report. F

[117] The plaintiff's expert had applied the following formula to calculate the Market Approach value of the subject asset as follows: G

> Market value of subject asset = Total number of active affiliates x Number of clients generated per active affiliate x Client acquisition cost.

[118] The report went on to state at para 5.1.4. that active affiliates means a list of affiliates who were paid commissions between January 2018 and January 2019 and affiliate leads means a list of potential affiliates stored in the plaintiff's online system, close.io. H

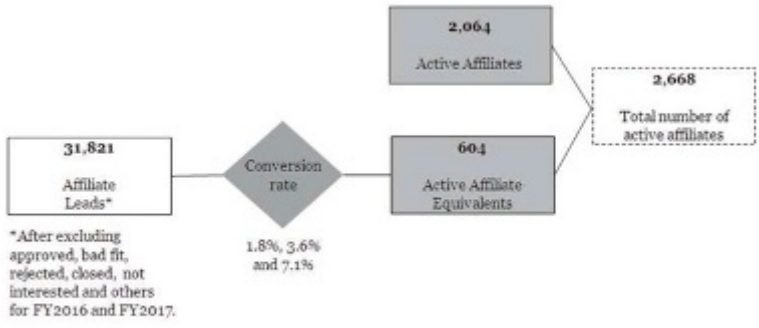
[119] There is no explanation as to why 'active affiliates' were so defined. The report does not refer to the median of the payment amount of the commission. We do not know if the Pareto Principle or the 80/20 rule applies in that about 80% of the commission paid is because of the business referred to by 20% of the active affiliates. I

[120] We do not know if it is a case where the payout is quite evenly distributed across very many affiliates. What is lacking in the expert report is the quality of the confidential information in the subject asset. Questions also arise as to how regular is the referral or is it a case of one referral for a USD100 commission would suffice to qualify as an 'active affiliate'.

[121] When the relevant information is not disclosed, we then have a problem on the reliability and accuracy of the valuation done on the subject asset.

[122] As we progress further in trying to make sense of the plaintiff's expert report, we find the assumptions made to be even less convincing and more speculative, uncertain and unreliable. The report reads as follows on converting 'the affiliate leads' into 'Active Affiliate Equivalents':

> Step 1: Derive the quantity of active affiliates
>
> 5.1.4. The first step is to determine the quantity of active affiliates to ascribe value to. As stated in paragraph 2.2 of this PwC report, the Subject Asset comprises Active Affiliates (list of affiliates who were paid commissions between January 2018 and January 2019) and Affiliate Leads (list of potential affiliates stored in the Plaintiff's online system, close.io).
>
> 5.1.5. In order to obtain the 'Total number of active affiliates' the Affiliate Leads have to be converted to Active Affiliate Equivalents (as explained in paragraph 5.2.8 to 5.2.13 of this PwC Report) based on a given conversion rate, as illustrated in the diagram below:



Source: Management, PwC analysis

[123] It is to be noted that there has been no independent verification of the 31,821 affiliate leads, the 2064 active affiliates by the plaintiff's expert. More importantly one cannot assume that these 2,668 active affiliates would all migrate to the company that the defendant now works for. There is no evidence before the High Court of any crossing-over to the competitor that results in a loss to the plaintiff or a gain to the defendant's present company.

[124] It does not need much understanding of human behaviour to say quite confidently that affiliates and clients would stay put or move because of a variety of factors such as personal relationship with key staff of the present company, the competitive rates for the affiliates, the ease with which the bets are placed, the real-time report of the status of one's bet, the ease of payment out, the real-time online statement of one's financial position in the bets, the intuitive interface of the website and the App as opposed to other competitors, the perceived strength of the company in terms of its paid-up capital, assets worth, regulatory compliance and corporate governance and whatever other value-added services to its affiliates and clients.

[125] Depending on the innovativeness of those in this trade, factors such as low barriers to entry and a wide range of offerings from Forex to Derivatives to Currencies and Stock and Indices with perhaps a free demo account for those trying to get a hang of things before taking the plunge would perhaps contribute to potential business partners and clients migrating to a competitor like Spectra.ai.

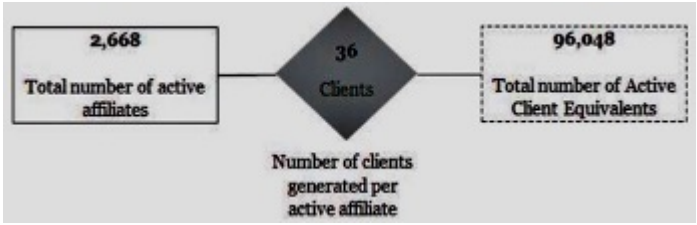
[126] Assuming that the loss suffered by the plaintiff can be quantified and it is linked to the affiliates switching referral of business, then it is for the plaintiff to prove its loss.

[127] Alternatively it is for the plaintiff to in an account of profits show how the leads in the business partners and clients that may have migrated to the defendant's company have generated business for the competitor company that Karen Yap is with now.

[128] The problem is further compounded when the business partners or clients concerned is still referring business to or still trades with the plaintiff. In a free world no company has an exclusive hold on any business partners or clients.

[129] PW3 then proceeded to Step 2 as follows:

> Step 2: Determine how many clients an active affiliate generates
>
> 5.1.6. The next step is to determine from historical trends, how many clients an active affiliate generates Binary.com, for the purpose of converting the quantity of active affiliates computed in Step 1, into Active Client Equivalents, as seen in the diagram below.
>
> Source: Management, PwC analysis.



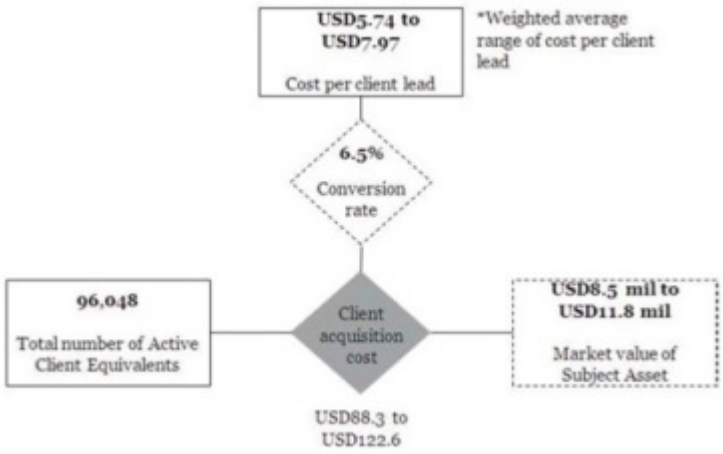
[130] Again we pause to observe that all these permutations and projections are rather hypothetical. This kind of valuation may be relevant in a case where there is a buyer keen to buy the subject asset which is the intangible asset consisting of affiliates and affiliate leads or business partners who may potentially refer more clients and with that more business to anyone venturing into a similar online betting business.

[131] As we know it the plaintiff is not selling but holding on to this subject asset for its dear life. The defendant's company is not keen to buy for information of such a nature has a rather short shelf-life depending on one's appetite for risk and one's propensity towards gambling. There are just too many factors influencing why a client would continue to bet or cease betting after having gotten burned or to reduce and increase its bets. There are always also new entrants into the online betting business which companies would try to interest the uninitiated.

[132] In an online platform, and gambling is no different, the world is one's oyster. You attract people who may try out the system with a small amount and see if they can outwit it. Others with a higher appetite for risk would go against the tide and buy when the price is spiraling downwards hoping to make a kill when it recovers. Yet others are serial gamblers whose eyes are glued to the screen 24/7 as it were, hoping also to make it big.

[133] The plaintiff's valuation expert PW3 then explained Step 3 as follows:

> Step 3: Calculate the client acquisition cost
>
> 5.1.7. Upon concluding Steps 1 and 2 where I have worked out the quantity of Active Client Equivalents derived from active affiliates, Step 3 computes the price or dollar metric to complete the formula of computing the Market Value of the Subject Asset.
>
> 5.1.8. This is done by simply dividing the market prices of client leads over the expected conversion rate of the said client leads, to be then multiplied by the Active Client Equivalents, to derive the final output of the value of the Subject Asset, illustrated below:



[134] *Again* we are not at all impressed with these figures generated as it does not differentiate between a one-time client from a regular client and a small bet client to a serial bet client. While a weighted average is said to be used, there is no independent verification of that by the plaintiff's expert. The expert had stated in his report at para 2.10 as follows:

> 2.10. I have relied on the integrity of the information made available to me. Unless specifically stated in this PwC Report, I have not sought independent verification or audit of the information provided.

[135] We would think that people like the defendant and competitors would be keen on the 20% of the business partners or clients that would generate 80% of the revenue for the company and perhaps to target these contacts for their marketing efforts.

[136] Bereft of this confidential information as the same was redacted, we do not think a fair assessment of the quality of the data with respect to the affiliates and affiliate leads and ultimately clients can be properly assessed and traced to arriving at what was the loss suffered by the plaintiff.

[137] While the confidential information may be redacted as the defendant had no problem knowing what the nature of the confidential information is, the same cannot be said to be applicable for assessment of damages. As pointed out the court must be satisfied as to the quality of the confidential information that is said to have a value of USD10.1m.

[138] Such an amount bears no relation to the worth of the plaintiff that is suing the defendant. As can be seen from the audited account of the Group of

Companies for the Year 2018 referred to by the plaintiff's valuation expert, it has a revenue of USD32m with a net operating profit of USD18.18m and net assets of USD17.72m:

> 3.1.5. In the financial year 2018, the Group of Companies reported net revenue of USD32.10 million and net operating profit of USD18.18 million which was derived from an active client count of 92,940 clients. Net assets of the Group of Companies were USD17.72 million as at 31 December 2018.

[139] The plaintiff's expert had not explained how the Group revenue of USD32.10m with a net operating profit of USD18.18m had been factored in rather than that of the Malaysian Company which is the plaintiff here that is bringing the suit.

[140] If the confidential information had not been used, then any fear of it being used in the future can be addressed with the continuation of the interim injunction in the form of a perpetual injunction restraining its use and for an order of delivery up of the devices that contain such confidential information. If the confidential information or any part of it had been used effectively, then the damage suffered would only be for the period in which the confidential information was used in the springboard sense.

[141] Whilst incontrovertible evidence of fact should be accepted by the trial court as true unless it is inherently incredible, where the evaluation of opinion evidence of an expert is concerned, the trial court must consider the basis of the approach taken, the assumptions, presumptions, permutations, projections and principles used and be satisfied that it is a fair method of evaluation having regard to the nature of the confidential information breached and the use of it by the infringer to generate profits for herself in this case or that of the company that she now works for.

[142] The trial judge cannot accept uncritically the opinion evidence of the valuation expert merely because there is no contrary evidence by the defendant's expert witness. In *UMW Toyota Motor Sdn Bhd & Anor v Allan Chong Teck Khin & Anor* [2021] 3 MLJ 107, the Court of Appeal observed as follows:

> [63] We consider it a well established principle that a defendant is perfectly entitled to challenge the evidence of the plaintiff's expert witness by way of cross-examination without him having to call his own experts. In *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281 at p 305; [2017] 4 CLJ 676 at p 698 Hasan Lah FCJ (speaking for the Federal Court) said:
>
> > [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party ... When the burden shifts to the other party, it can be discharged by cross-examination of

G witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of these different methods (see *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147).

[64] On the strength of the foregoing authorities, it is permissible in law for one party to rebut its adversary's case by cross-examining the latter's own witnesses including his expert witness. Thus, the defendants in our present case were perfectly entitled to challenge the evidence of the plaintiffs 'experts, SP1 and SP2, by way of cross-examination without them having to call their own I experts.

[65] We find that the learned trial judge had failed to appreciate that through the cross-examination of the plaintiffs 'own expert witnesses (SP1 and SP2), the defendants had been able to get them to admit and confirm that the vehicle did not suffer from abnormal or excessive vibrations as the first plaintiff had alleged and that in fact the vibration levels in the said vehicle were within the comfortable range.

[143] The learned JC had not given the reasons for agreeing with the PWC expert report. Furthermore, the expert had not explored the various methods and approaches available in assessing such a loss arising out of breach of confidential information and why he had descended to his proposed method as the most reasonable one.

[144] In a case of this nature where there is no evidence of the nexus between the breach and the loss of profit suffered by the plaintiff, the court in assessing damages may, inter alia, base the assessment on the time, costs and expense in collating and compiling a similar list of confidential information and also take into consideration the costs and time saved in gaining a headway or a springboard and being able to get a head start by such unlawful access to the confidential information.

[145] After all the pleading of the plaintiff is that the confidential information has been used by her new employer as a springboard in gaining an unfair advantage over the plaintiff. We find that the plaintiff's expert's assessment of the so-called market value of the confidential information to be rather artificial, speculative, unrealistic and unreliable.

[146] Alternatively, the High Court may explore whether an account of profits should be a more appropriate remedy if it is not impractical to prove having regard to the lapse of time between the breach and the assessment of damages. This will be discussed below.

[147] The court may also explore if an award of exemplary damages would be appropriate in the circumstances of the case in the light of the unconscionable and egregious massive copying of data out of the plaintiff's database to that of

A the defendant even assuming for a moment that the above methods and modes of assessing damages may not be feasible and practical.

[148] The court must be cognisant of the reality of the online computing world, where the vulnerability of companies in safeguarding their confidential B information from theft, conversion or misuse by key staff having special access to it are magnified manifold.

Whether the assessment of damages should be in line with Wrotham Park damages in an account of profits

C

[149] Learned counsel for the plaintiff referred to the case of *Seager v Copydex Ltd* [1967] 1 WLR 923, where the UK Court of Appeal found against the defendant for breach of confidence and in *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809, the issue of damages was considered and Lord Denning MR held: D

> Now a question has arisen as to the principles on which the damages are to be assessed. They are to be assessed, as we said, at the value of the information which the defendants took. If I may use an analogy, it is like damages for conversion. Damages for conversion are the value of the goods. Once the damages are paid, the E goods become the property of the defendant. A satisfied judgment in trover transfers the property in the goods. So here, once the damages are assessed and paid, the confidential information belongs to the defendants.
>
> The difficulty is to assess the value of the information taken by the defendants. We have had a most helpful discussion about it. The value of the confidential F information depends on the nature of it. If there was nothing very special about it, that is, if it involved no particular inventive step, but was the sort of information which could be obtained by employing any competent consultant, then the value of it was the fee which a consultant would charge for it: because in that case the defendants, by taking the information, would only have saved themselves the time and trouble of employing a consultant. But, on the other hand, if the information G was something special, as, for instance, if it involved an inventive step or something so unusual that it could not be obtained by just going to a consultant, then the value of it is much higher. It is not merely a consultant's fee, but the price which a willing buyer — desirous of obtaining it — would pay for it.

H

[150] An action in trover is an action for recovery of damages for wrongful taking and depriving of use of the personal property of another. Not all cases are amenable to such an assessment of damages especially with respect to confidential information where there is no ready indicative market for its value I unlike a physical item where one can assess its market value by looking at what was the price when bought and what is the current price and factoring in depreciation.

[151] We accept the fact that merely because it is difficult to prove damages in a case of breach of confidential information, it does not mean then that the plaintiff who suffers the breach would have to settle for nominal damages. The court may award what is often referred to as '*Wrotham Park* damages' after the case of *Wrotham Park Estate Company v Parkside Homes Ltd and others; Wrotham Park Estate Company v Parkside Homes Ltd* [1974] 2 All ER 321 where a substantial right of a plaintiff has been infringed or violated. In that case, the court employed the concept of a 'hypothetical bargain' between the parties to license the invasion of the claimant's right. In that case, Brightman J awarded damages for breach of a restrictive covenant attaching to land, assessed by reference to the contract-breaker's gain from the breach, at 5% of the anticipated profit from the wrongful development. The judge considered this to be the sum that the claimant, acting reasonably, could have demanded from the defendant for relaxing the restrictive covenant.

[152] In other words, damages need not be assessed by measuring the loss suffered by the plaintiff resulting from his rights being infringed or violated but from a reasonable payment from the gain made by the defendant.

[153] Learned counsel for the plaintiff submitted that *Wrotham Park* case was recognised by the House of Lords in *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268. There Lord Nicholls, speaking for the majority, discussed the circumstances in which damages in tort or for an equitable wrong or for a breach of contract may be assessed by reference to a financial gain obtained by the defendant rather than any financial loss suffered by the claimant. It was in that context that Lord Nicholls referred to the *Wrotham Park* case and said with singular clarity (at 283H-284A):

> The *Wrotham Park* case ... still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case, damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained.

[154] We have no quarrel with the principle nor do we question its wisdom especially in cases of unlawful use of confidential information by the wrongdoer. We accept the proposition that *Blake*'s case established that a money award measured by the benefit gained by a wrongdoer can, exceptionally, be made even in an action for breach of contract. In *Blake*'s case itself the defendant's wrong consisted in the misuse of information. The justice of requiring a person who obtains a benefit from the wrongful use of information to surrender the benefit to the claimant does not depend on the source of the rights infringed.

[155] Learned counsel for the plaintiff further drew our attention to the case

of *One Step (Support) Ltd v Morris-Garner and another* [2019] AC 649, where the Supreme Court explained the availability of *Wrotham Park* damages (re-named 'negotiating damages') in breach of contract cases, and unanimously expressed no doubt as to the orthodox approach of awarding negotiating damages in cases: (i) where there has been an invasion of property rights and intellectual property rights of a proprietary nature (user principle); and (ii) where damages were being awarded in lieu of an injunction (of which the *Wrotham Park* case was an example). Lord Reed JSC speaking for the UK Supreme Court propounded as follows:

> Where on the other hand an unlawful use is made of property, and the right to control such use is a valuable asset, the owner suffers a loss of a different kind, which calls for a different method of assessing damages ... Put shortly, he takes something for nothing, for which the owner was entitled to require payment.

[156] Again, we have no quibble with the above proposition. The question is how to assess the damages based on the gain made by the wrongdoer. The plaintiff's submission is that in line with *Seager v Copydex Ltd (No 2)*, it had engaged PW3 Lim Chee Teong of PWC Advisory Services Sdn Bhd as a valuation expert to assess the value of two databases misappropriated by Karen Yap as *Wrotham Park* damages.

[157] It was further urged upon us that databases such as the above have a measurable commercial value is also recognised by the CEO of Spectre.ai in his remarks to shareholders about poaching Karen Yap at CCB/4/91–97 (@ p 93, in 20–32):

> ... *what we have done is we've taken out one of our biggest competitors, with a much lower spend so to put it, a monthly salary, with a good variable compensation plan what have you.*
>
> This person hypothetically, not that they will, but hypothetically can literally take over Spectre.ai and run it. They are a veteran in that space. (Emphasis added.)

[158] The inference that may be made is that Karen Yap had misappropriated the confidential information for Spectre.ai with a view to personally gain for herself or at least that she has intention to use it if necessary to swing over some businesses from the plaintiff by use of such contacts. We appreciate where the plaintiff was coming from and the anxiety expressed in the evidence of the CEO of the plaintiff in PW1 as follows in his witness statement at CCB/3/62-100 (@ pp 94, 41, 102–103):

> Answer to Q41 WS-PW1
>
> As the Plaintiff's HR and Administrative Manager will be testifying, the Defendant had told her about a substantial sign-on bonus that is consistent with the messages we have seen above, and not customary in the industry. I believe that it was a financial quid pro quo for the supply of our databases, trade secrets, and other

confidential information. The Defendant would have gained other intangible benefit associated with her unlawful retention and use of the Plaintiff's Confidential Information in her employment, not only with her current employer but with any other competitor of the Plaintiff in the trade.

Answer to Q3 WS-PW2

Yes, we spoke about this a few times during the last few days of her employment. She told me that she was going to join a startup company that is in the industry of mobile gaming and that part of her offer involves a sign-on bonus of USD300,000 to be paid in stages plus a company house and car. I recall this distinctly because in one of our conversations, she told me that she was going to request that the money be given to her as shares in the company, and I told her that I thought it would be better to get cash and we discussed about her becoming a millionaire as we were discussing it in terms of Ringgit.

[159] Reprehensible as the action of Karen Yap may be, the plaintiff would still need to prove the amount of damage suffered for difficulty in proving does not dispense with the need to prove though the court may in certain cases award an aggravated or exemplary damages where there has been an egregious and contumelious breach even though it could not be shown either that the plaintiff had suffered a loss or that the defendant had made a gain.

[160] As pointed out, the method employed by the plaintiff's valuation expert in assessing the value of the confidential information is fundamentally flawed as there is no market for such information and the projections and permutations of profits that could be generated by such abuse of confidential information is premised on a projected actual use of it in generating business to the benefit of Karen Yap or the competitor company she now works for.

[161] There is no evidence as to what confidential information is translated into income generating business for Karen Yap or the company that she has joined. Perhaps the plaintiff may want to embark on a post-judgment discovery with respect to the emails and database contacts and information that have been harnessed and harvested for helping to generate fresh business by Karen Yap in her new company.

[162] What is obvious so far is that the assessment of damages at USD10.1m cannot be supported by a scrutiny of the curial evidence led in the plaintiff's valuation expert report.

[163] No doubt in Karen Yap's position as a fiduciary of the plaintiff there is a wide array of reliefs available to an aggrieved plaintiff like BSG. In *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 at p 321H and 326E, the Court of Appeal said:

A There is, we find, little difficulty in this area of the law. A plaintiff who proves a case of breach of trust or of fiduciary relationship is entitled to a wide range of relief. He may ask for and obtain an account of profits. Or he may have a receiver appointed to recover money due to him. Or he may obtain damages.

...

B ... the purpose of equity is to ensure disgorgement by a wrongdoer who has profited through an abuse of confidence ... In our judgment, no technical argument ought to be permitted to stand in the way of righting the wrong done to the respondents.

C **[164]** However, a plaintiff like BSG here is not entitled to both damages and an account of profits which were granted by the High Court below. The plaintiff would have to elect one or the other. On that score alone, the order of the High Court granted both damages and an account of profit cannot stand and so has to be set aside.

D *Whether this is a fit and proper case to remit the case back to the High Court for a proper assessment of damages*

[165] The grounds of judgment ('GOJ') with respect to why the court had E agreed with the plaintiff's expert in PW3 is just a few short paragraphs stating that the said expert had arrived at the sum of USD10.1m. With respect we do not see the analysis by the learned JC of the expert opinion given. The relevant paragraphs of the GOJ are reproduced below:

F [39] This court accepted PW3 as an expert witness within the meaning ascribed by s 45 of the Evidence Act 1950. This court also accepted P8A and the testimony of PW3. This court found his evidence credible, reasonable and withstood logical analysis.

[40] The defendant did not offer any expert of any witness or any material to oppose the evidence of PW3.

G [41] This court founds that, on the balance of probabilities, the plaintiff proved (sic) their claim for general damages in the sum of USD 10.1m.

[166] The court must apply its mind to the opinion as expressed by the H plaintiff's expert, having regard to the defendant's counsel's cross-examination of the plaintiff's expert and to evaluate if the assessment makes sense, is reliable and fair and not speculative, uncertain and hypothetical.

[167] As this court on appeal found that the plaintiff is not entitled to I damages in the sum of USD10.1m and as the plaintiff had prayed for an account of profits as against Karen Yap, the plaintiff, in the circumstances of this case where there had been an egregious breach of the confidential information, is entitled to proceed with the alternative remedy of an account of profits.

[168] A proper order for this court to make is to remit the matter of assessment of damages to the trial court for that to be properly assessed. In the interest of justice and to prevent a miscarriage of justice, both parties are at liberty to call further witnesses and to put in their further expert reports as they may be minded to, subject always to further directions that the High Court may give.

[169] The plaintiff argued that this court is at liberty after hearing the appeal, to assess the damages as it sees fit. With respect, we are not inclined to do so as it would involve a proper finding of fact with respect to the evidence to be adduced with respect to an account of profits made by Karen Yap or as utilised by her for the benefit of the company that she has joined.

[170] This may involve the plaintiff making the necessary application before the High Court for a post-judgment discovery along the lines provided for in *Kingtime International Ltd & Anor v Petrofac E&C Sdn Bhd* [2020] 11 MLJ 141 where Justice Wong Kian Kheong J (now JCA) held as follows:

> [15] I am of the following view regarding O 24 rr 3 and 7 of the RC:
>
> (a) the court has a discretion under O 23 rr 3 and/or 7 of the RC to order discovery of documents. This is clear from the use of the permissive term 'may' in O 24 rr 3 and 7 of the RC. The court's exercise of discretion to order discovery of documents pursuant to O 24 rr 3 and 7 of the RC, depends on the particular circumstances of each case ...

[171] As the High Court would need to ascertain the data and confidential information that may have been utilised to generate new business and profit, the actual data and confidential information utilised would have to be disclosed to the High Court in its assessment of an account of profits.

[172] As the parties' confidential information may have to be disclosed in the carrying out of this exercise by the High Court in making an assessment of an account of profits, the parties may pray for the High Court to grant the necessary protective order or sealing order under the High Court's inherent jurisdiction and inherent powers under O 92 r 4 of the ROC. For the possible terms of the protective order, see para [22] of *Kingtime International Ltd*'s case.

[173] In the case of *Kingtime International Ltd*'s case the High Court had at para [20] referred to the Singapore case of *BBW v BBX and Others* [2016] 5 SLR 755 at paras [21]–[30] and to the following UK cases:

> [20] ... (2) the following UK cases have granted protective orders:
>
> (a) in the Court of Appeal case of *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354 at pp 359–360, Buckley LJ ordered that only the court, counsel and certain persons from the party applying for discovery

could have access to the confidential information in question; and

(b) in *Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45 at pp H 50–52 Aldous J (as he then was) in the High Court imposed certain conditions on the discovery of confidential information, namely the plaintiffs (who applied for discovery) had to undertake:

(i) that the person to whom the confidential information was to be disclosed, should not be involved in similar proceedings in a French court; and

(ii) to pay the defendants any sum the court might decide that the defendants (who disclosed the confidential information) had suffered by any wrongful disclosure of the confidential information.

The above decision by Aldous J has been affirmed on appeal to the Court of Appeal;

(3) Protective Orders have also been granted in the following Australian cases:

(a) in *Mobil Oil Australia Ltd & McDonalds Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at pp39–40, Hayne JA (as he then was) in the Court of Appeal of the State of Victoria held that in ordering a discovery of confidential information, the court may restrict access to such information to counsel, solicitor and nominated experts only; and

(b) the judgment of Finkelstein J in the Federal Court in *Conor Medsystems Inc v University of British Columbia (No 4)* [2007] FCA 324 at paras [7]–[13]; and

(4) Protective Orders have been granted in many jurisdictions such as Singapore, UK, Australia, United States of America and Canada. It will be an anomaly, if not an injustice, if our courts do not have the power to grant protective orders; and

(5) in deciding to grant a protective order or otherwise:

(a) the court should balance the following competing considerations:

(i) public interest requires all relevant evidence to be disclosed to the court so as to enable the court to decide justly the case at hand;

(ii) the plaintiff's right to apply for discovery of all relevant documents in support of the plaintiff's claim; and

(iii) the need to protect the defendant's proprietary interest in the confidential information in question;

(b) there is no universal or general formula to be followed — please see the judgment of Russell LJ (as he then was) in Warner-Lambert Co at p 362; and

(c) the learned judge should inspect the documents himself or herself to decide whether a protective order should be granted or not — please see Mobil Oil Australia at p 40. If parts of the confidential information are not relevant to the case in question, the court may redact those parts. Such a redacting power is clear from the following cases:

(i) please see the judgment of Lord Wilberforce in the House of Lords

in *Science Research Council v Nasse BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673 at p 680; and

(ii) *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621 at para [26](1) and (2).

[174] We are conscious of the fact that where we can assess the damages whether by way of the loss suffered by the plaintiff or as in this case, more appropriately the gain or profit made by the defendant via an account of profits, we should proceed with the assessment exercise. However, in this case the evidence is not before us.

[175] For the Court of Appeal to embark on this exercise of assessing the discovery order application and hearing evidence on the data and information disclosed as well as hearing the witnesses and experts of the parties would be to encroach into its limited time reserved for hearing of the relentless and unrelenting appeals from the High Court and motions arising therefrom.

[176] To decide on the assessment at the Court of Appeal level will also deprive the parties of one tier of appeal in a case where the assessment of damages had not been properly done.

[177] We also hear the defendant arguing that to remit the matter back to the High Court would be to give the plaintiff a second bite at the proverbial cherry. We do not think so. In fact, Karen Yap would have an opportunity to redeem herself in showing that the confidential information was not utilised to the detriment of the plaintiff nor to the profit of the defendant or the company she has joined, whether by way of spring boarding or otherwise.

[178] We had for the reasons given above, concluded and agreed with the High Court where liability is concerned with respect to the breach of confidential information. Thus, that issue is not to be revisited but the question is how to assess damages which may be more appropriately done by way of an account of profits.

[179] Even if no profits can be proved as arising from the breach, or that it would be impractical to gather the evidence as a considerable passage of time has lapsed, we do not think the facts of this case justify a grant of nominal damages in the light of the blatant breach by the resigning staff in Karen Yap. No company's information would be safe if a staff resigning can willy-nilly copy the whole database of the company to give it a 'springboard' to start or in this case, to try to enhance and expand the business of a competitor that the

defendant has joined. It is for the High Court to assess the proper quantum of exemplary or aggravated exemplary that ought to be given in the circumstances of the case.

[180] In *Rookes v Barnard* [1964] AC 1129 Lord Devlin held that for the court to have a discretion to award exemplary damages in tort, either the facts of the case must fall within one or other of two broad factual categories, or the award of exemplary damages in the circumstances of the case must be expressly authorised by statute. The two factual categories are: (1) Oppressive, arbitrary or unconstitutional actions by servants of the Government; and (2) Conduct (by the defendant) calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff.

[181] In *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, the Court of Appeal observed as follows:

> The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where *he has acted with a 'contumelious disregard 'for the right to the plaintiff.* The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and *the award may also have an important function in vindicating the rights of the plaintiff.* (Emphasis added.)

[182] In the Singapore Court of Appeal's case of *I-Admin (Singapore) Pte Ltd*, the Court of Appeal in reversing the finding of the High Court and in holding that there was a breach of confidential information by respondent/defendant, remitted the matter back to the High Court for assessment of equitable damages in para [77] as follows:

> 77. It is uncontroversial that Singapore courts have the jurisdiction to award equitable damages. Paragraph14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), read with s 18(2) thereof, gives the High Court the '[p]ower to grant all reliefs and remedies at law and equity, including damages in addition to, or in substitution for, an injunction or specific performance'; see also *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [141]. The remedy of equitable damages is attractive because it affords the court the flexibility to determine the manner in which damages should be assessed. To that end, the dicta in the *Seager* decisions serve as a useful guide.

[183] The Court of Appeal of New Zealand in *Aquaculture Corpn v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at p 301 had expressed the view that there is no good reason in principle why exemplary damages should

not be awarded for actionable breach of confidence in a case where a compensatory award would not adequately reflect the gravity of the defendant's conduct. Cooke P explained as follows at pp 301–302:

> There is now a line of judgments in this Court accepting that monetary compensation (which can be labelled damages) may be awarded for breach of a duty of confidence or other duty deriving historically from equity; see *Coleman v Myers* [1977] 2 NZLR 225, 359-362, 379; *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515, 525; *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354, 361; *Day v Mead* [1987] 2 NZLR 443, 450–451, 460–462, 467, 469; *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 172. In some of these cases the relevant observations were arguably obiter, but we think that the point should now be taken as settled in New Zealand. Whether the obligation of confidence in a case of the present kind should be classified as purely an equitable one is debatable, but we do not think that the question matters for any purpose material to this appeal. *For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute.*
>
> We add only, in addition to the overseas authorities cited in the foregoing line of cases, *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 and *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639, where a broadly similar approach is taken by the Supreme Court of Canada and by Rogers J in the Supreme Court of New South Wales.
>
> The appellants should therefore have judgment for the compensatory damages assessed by the Judge. There then arises the question whether they should hold the award of exemplary damages as well. *Exemplary damages are awarded only in so far as compensatory damages do not adequately punish the defendant for outrageous conduct;* see *Auckland City Council v Blundell* [1986] 1 NZLR 732, 738 and the cases there mentioned. The Judge's reference to his compensatory assessment as 'conservative' suggests that he might have entertained a cumulative award. If there were any doubt about jurisdiction we think that it would lie in that area. But, applying the foregoing approach as to the available range of remedies, *we see no reason in principle why exemplary damages should not be awarded for actionable breach of confidence in a case where a compensatory award would not adequately reflect the gravity of the defendant's conduct.* Without denying jurisdiction, however, we are not satisfied on the facts that this is a case for both heads of damages. (Emphasis added.)

[184] The defendant may have a valid cause for complaint if she is not allowed to call herself as a witness or to call any other witnesses that she may be minded to for the purpose of assessment of damages. Here the defendant had said that the High Court should have allowed her to give evidence via zoom as she was based in Cyprus where her new employer is and that there is still the risk of contracting the Covid 19 virus. However, more than sufficient notice and adjournments had been granted by the High Court to accommodate the defendant and we would not intervene in the decision of the High Court to

dismiss her application that the trial be by way of zoom, which application was filed at the 11th hour a day before the trial was scheduled for continued hearing with the defendant being called as a witness. If indeed she was serious in giving evidence, here is the golden opportunity now that there are no travel restrictions, to come to the Melaka High Court to give evidence to rebut the misuse or abuse of confidential information alleged against her where assessment of damages is concerned.

[185] While the defendant may still feel aggrieved, this court in the interest of justice for both the parties, have decided that a retrial confined only to the issue of damages would be fair and proper. Whilst we are with the High Court on the issue of liability we are not satisfied that the damages to the tune of USD10.1m had been properly assessed by the High Court.

[186] We are mindful of the fact that an appellate court should not be too ready to remit a matter for a retrial even in a case of a non-speaking judgment but that one should have regard to the issue as to whether there has been a miscarriage of justice and whether it is in the interests of justice for the matter to be reheard. See the Federal Court case of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281.

[187] Here we take comfort from the fact that the remitting back is only for the limited purpose of assessment of damages. What we are doing is not without precedent. The Federal Court in *Busing ak Jali & Ors v Kerajaan Negeri Sarawak & Anor and other appeals* [2022] 2 MLJ 273 in remitting the matter to the Court of Appeal on assessment of compensation with respect to native customary land wrongfully acquired by the State, said as follows:

> [163] However, with the coming into force of s 6A, we are of the view that this appeal ought to be sent back to the Court of Appeal for a finding of fact specifically on the area where Pemakai Menoa and Pulau Galau are situated within the 8,001 hectares considering a maximum of 500 hectares or 1,000 hectares of Pemakai Menoa and Pulau Galau accordingly as allowed under s 6A. Any such finding would be relevant for the purpose of compensation under s 197 of the SLC to the appellants who might have been deprived of their rights by reason of alienation of the lands to third parties.
>
> [164] Undoubtedly, the Federal Court can and is legally entitled to make such assessment, however, by doing so, the parties are deprived of an avenue to appeal further on the matter of assessment.

[188] The Court of Appeal eventually remitted the case to the High Court for assessment of compensation as the relevant finding of facts is best made by the High Court after hearing the experts. See para [26] of the Court of Appeal's decision in *Superintendent of Lands & Surveys Samarahan Division Jalan Dato*

Mohd Musa & Ors v Nikodemus ak Singai & Ors [2023] 2 MLJ 137; [2023] 2 MLRA 275.

[189] Likewise, in the case before us we are not the best forum to assess damages as we would have to hear witnesses and experts and pore through the expert reports and the efficacy of any 'hot-tubbing' or the concurrent giving of evidence of the experts would be more conveniently and expeditiously done by the High Court being the trial court that is tasked to make relevant finding of facts.

DECISION

[190] We would therefore allow the merits appeal in part and affirm the decision of the High Court on liability but all the orders of the High Court, with the exception of prayer (4A), with respect to quantum and damages including injunctions are hereby set aside. The interlocutory injunction earlier given until trial is hereby reinstated.

[191] Prayer (4A) is an order that within seven days from the date of the High Court judgment, the defendant shall fully implement all proper and necessary steps and processes to transfer ownership of the Telegram Group that is accessible from https://t.me/binarydotcom ('plaintiff's Telegram Group') to the plaintiff's nominated representative. We were given to understand that the defendant has no problem complying with the said prayer (4A).

[192] We further order the matter to be remitted to the High Court for a proper assessment of damages based on the guideline that we have alluded to. Parties are at liberty to call further witnesses and file further documents and expert reports if minded to and also raise any objections with respect to the documents to be referred to for the purposes of assessment of damages.

[193] The High Court after assessing damages is at liberty to decide on whether the injunctive reliefs prayed for should be granted and if so on what terms. As for costs, the order of costs in the High Court was also set aside and replaced with costs of RM130,000 to the plaintiff, subject to allocator.

[194] Each party shall bear their own costs for this appeal.

Zoom appeal dismissed; finding of liability in the merits appeal affirmed, award of

A *damages set aside; and case remitted back to the trial court for a proper re-assessment of the damages payable by the appellant.*

Reported by Ashok Kumar

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